Supreme Court, U.S.
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No. 991389

In The

Supreme Court of the United States

SALT RIVER VALLEY WATER USERS' ASSOCIATION and SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioners,

versus

THE UNITED STATES, THE SAN CARLOS APACHE TRIBE, THE TONTO APACHE TRIBE, THE YAVAPAI-APACHE NATION, THE HOPI TRIBE, THE NAVAJO NATION, THE SAN JUAN SOUTHERN PAIUTE TRIBE, THE GILA RIVER INDIAN COMMUNITY, and SILAS KISTO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona law?

PARTIES TO THE PROCEEDING IN THE ARIZONA SUPREME COURT

This petition for a writ of certiorari arises out of massive general stream adjudication proceedings pending in the State of Arizona. The actions involve more than 27,000 parties and over 77,000 claims. *San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 186 (Ariz. 1999). In addition to the petitioners and respondents herein, the following parties participated in the proceedings before the Arizona Supreme Court which are sought to be reviewed by this petition:

State of Arizona
City of Phoenix, Arizona
City of Chandler, Arizona
City of Glendale, Arizona
City of Mesa, Arizona
City of Scottsdale, Arizona
City of Tucson, Arizona
City of Sierra Vista, Arizona
City of Benson, Arizona
Town of Gilbert, Arizona
City of Globe, Arizona
Town of Mammoth, Arizona
Town of Patagonia, Arizona
City of Flagstaff, Arizona
City of Tempe, Arizona
Magma Copper Company
Apache Nitrogen Products Association
Arizona Rock Products Association
Arizona Public Service Company
Roosevelt Water Conservation District
Aztec Land and Cattle Company, Ltd.
Cyprus Christmas Mine Corporation

PARTIES TO THE PROCEEDING IN THE ARIZONA SUPREME COURT – Continued

Cyprus Miami Mining Corporation
Cyprus Pima Mining Corporation
Cyprus Sierrita Corporation
Cyprus Twin Buttes Corporation
Stone Container Corporation
ASARCO Incorporated
Phelps Dodge Corporation
Buckeye Irrigation Company
Buckeye Water Conservation and Drainage District
Members of the Gila Bend-Dendora Valley Water Users Association
Gila Valley Irrigation District
Franklin Irrigation District
Tenneco West, Inc.
Tenneco Arizona Properties Corporation
Arlington Canal Company
Bella Vista Ranches Limited Partnership
Bella Vista Water Company, Inc.
Cortaro-Marana Irrigation District
Pima County, Arizona
Cortaro Water Users' Association
Rigby Water Company
Valencia Water Company, Inc.
Little Colorado Water Association
Rio Rico Properties, Inc.
Pinetop-Woodland Irrigation Company
Woodland Irrigation Company
Ponderosa Domestic Water Improvement District
Roosevelt Irrigation District
Wayne D. Klump

CORPORATE DISCLOSURE STATEMENT

Petitioner Salt River Valley Water Users' Association ("SRVWUA") is a private corporation organized under the laws of the State of Arizona. There is no parent corporation or publicly held company owning ten percent or more of SRVWUA's stock. (Rule 29.6, Rules of the Supreme Court of the United States.)

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PETITION FOR WRIT OF CERTIORARI

Petitioners Salt River Valley Water Users' Association, a private corporation organized under Arizona law, and Salt River Project Agricultural Improvement and Power District, a political subdivision of the State of Arizona, respectfully request that a writ of certiorari issue to review the portion of the opinion of the Supreme Court of Arizona entered on November 19, 1999 on the question presented herein, which is whether federal reserved rights extend to groundwater that is not appropriable under Arizona law.

OPINION BELOW

The opinion below of the Supreme Court of Arizona is reported as *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) (sometimes referred to in this petition as *"Gila River III"* in order to distinguish it from cases cited in the decision below as *Gila River I* and *Gila River II*) and is set forth in Appendix A to this petition.

JURISDICTION

The decision of the Supreme Court of Arizona in *Gila River III* was rendered on November 19, 1999. No motions for rehearing were filed in the Supreme Court of Arizona. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a). The decision below resolved a substantial federal question regarding the doctrine of federal reserved

water rights. The ultimate resolution of the question lies exclusively within the jurisdiction of this Court.

STATUTORY PROVISIONS INVOLVED IN THE CASE

1. Arizona Revised Statutes ("A.R.S.") § 45-141.A provides in relevant part:

> The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, . . . and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.

2. A.R.S. § 45-251 provides in relevant part:

> In this article, unless the context otherwise requires:
>
> * * *
>
> 2. 'General adjudication' means an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source.
>
> 3. 'Person' means an individual, a partnership, a corporation, a municipal corporation, the state of Arizona or any political subdivision, the United States of America, an Indian tribe or a community or any other legal entity, public or private.
>
> * * *

> 7. 'River system and source' means all water appropriable under § 45-141 and all water subject to claims based upon federal law.

3. Arizona statutory provisions constituting the Groundwater Code, A.R.S. §§ 45-401 through 45-704, the provisions relevant to this petition being portions of 45-451.A.1 and 45-453. A.R.S. § 45-451.A.1 provides: "In an active management area, a person may . . . [w]ithdraw and use groundwater only in accordance with" specified provisions of the Groundwater Code. A.R.S. § 45-453 provides in part: "In areas outside of active management areas, a person may . . . [w]ithdraw and use groundwater for reasonable and beneficial use. . . . "

STATEMENT OF THE CASE

I. THE NATURE AND SCOPE OF THE PENDING PROCEEDINGS

This petition concerns comprehensive general stream water rights adjudications pending in state court in Arizona. The decision below was rendered in a consolidated action known as the Gila River adjudication, which will determine all rights to water within the watersheds of the Salt, Verde, Gila, Agua Fria, Santa Cruz and San Pedro rivers. The Little Colorado River watershed is the subject of a similar general stream adjudication.

The purpose of the pending general stream adjudications is to determine "the nature, extent and relative priority" of rights to use the waters of the particular "river system and source." A.R.S. §§ 45-251(2), -252(a). Together, the pending adjudications encompass most of

Arizona and will determine the vast majority of the water rights in the state not involving the main stem of the Colorado River.

The waters included in each "river system and source" at issue in the pending adjudications in Arizona are "all water appropriable under [A.R.S.] § 45-141 and all water subject to claims based upon federal law." A.R.S. § 45-251.[1] Under Arizona law, appropriable water is limited to surface water, water flowing in definite underground channels, and a judicially defined category of underground water known as "subflow." *See* A.R.S. § 45-141; *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 857 P.2d 1236 (Ariz. 1993) ("*Gila River II*").[2] Appropriable water – "surface" water, "water flowing in definite underground channels," and "subflow" – is governed by the doctrine of prior appropriation, which this Court has summarized as follows:

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[1] The United States and Indian tribes were joined as parties to the pending adjudications in Arizona courts pursuant to the McCarran Amendment, 43 U.S.C. § 666, which authorizes such joinder "for the adjudication of rights to the use of water of a river system or other source. . . ." Jurisdiction of Arizona courts over the United States and Indian tribes in the pending adjudications was upheld in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545 (1983) and *United States v. Superior Court*, 697 P.2d 658 (Ariz. 1985).

[2] Subflow is "those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream." *Maricopa County Municipal Water Conservation District No. 1 v. Southwest Cotton Co.*, 4 P.2d 369, 380 (Ariz. 1931).

> [T]he one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. 'First in time, first in right' is the short hand expression of this legal principle.

Arizona v. California, 373 U.S. 546, 555 (1963) (footnote omitted).

Underground water not flowing in a definite underground channel and not constituting subflow is known as "groundwater" or "percolating groundwater." App. A8-A9. The principal groundwater aquifers in Arizona are shown in App. G.

Under Arizona law, groundwater is governed by the doctrine of reasonable use or by the Groundwater Code, A.R.S. §§ 45-401 through 45-704.[3] The doctrine of reasonable use permits an overlying landowner to withdraw as

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[3] The basic provisions of the Groundwater Code are summarized in *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324 (Ariz. 1981), *appeal dismissed*, 457 U.S. 1101 (1982). The Code provided for the establishment of "active management areas" ("AMAs"), which are geographical areas where active management practices are necessary to preserve the existing supply of groundwater for future needs. *See* A.R.S. §§ 45-411, 45-412.A. Each AMA encompasses one or more groundwater basins. *Town of Chino Valley*, 638 P.2d at 1325. The Code authorizes continuation of specified historic uses of groundwater in AMAs and expansion of withdrawals for certain municipal and domestic uses, but prohibits most other new uses of groundwater in AMAs. *Id.* It also regulates transportation of groundwater. *Id.* A primary goal of the Code for most aquifers is to achieve and maintain safe-yield, which is a long-term balance between groundwater withdrawals and recharge. Arizona Dep't of Water Resources, *Arizona Water Resources Assessment, Vol. I, Inventory and Analysis* 35 (1994)

much groundwater as can reasonably be used upon the overlying land and relieves the landowner from liability for a resulting diminution of another landowner's water supply. App. A10 n. 3; *Bristor v. Cheatham*, 255 P.2d 173, 180 (Ariz. 1953). In contrast to state and federal rights to appropriable water in Arizona, use of groundwater in Arizona is not subject to a priority scheme. *Gila River II*, 857 P.2d at 1240 (groundwater "is excluded from the legal rules applying to prior appropriation").[4]

Under A.R.S. § 45-251, the scope of the pending adjudications includes water subject to claims based upon federal law. Claims by the United States and Indian tribes to water within the State of Arizona are based in part upon a rule of substantive federal law known as the doctrine of federal reserved water rights, which was expressly enunciated by this Court in *Winters v. United States*, 207 U.S. 564 (1908). *Cappaert v. United States*, 426 U.S. 128 (1976) summarized the reserved rights doctrine as follows:

("*ADWR Assessment*"). In the Pinal AMA, the goal is to "preserve existing agricultural economies . . . for as long as feasible, consistent with the necessity to preserve future water supplies for non-irrigation uses." A.R.S. § 45-562.B. Many of the specific provisions of the Groundwater Code are also discussed in John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L. J. 657 (1988) and Jon L. Kyl, *The 1980 Arizona Groundwater Management Act: From Inception to Current Constitutional Challenge*, 53 U. Colo. L. Rev. 471 (1982).

[4] For a more complete discussion of the historical derivation and application of Arizona's bifurcated system of water rights, see *Southwest Cotton*, *Gila River II* and Leshy & Belanger, *supra*.

> [W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.

Id. at 138. The doctrine applies to Indian reservations as well as other federal enclaves such as national parks, monuments, forests, wildlife preserves, and military bases. *Id.* at 138-39; *Arizona v. California*, 373 U.S. at 601.

In the pending adjudications in Arizona, the United States and Indian tribes are pursuing claims to enormous quantities of water and are asserting that the federal reserved rights doctrine extends to groundwater. In fact, the majority of the water claimed for Indian reservations involved in these cases is implicitly for groundwater.[5]

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[5] Filings with the Arizona Department of Water Resources reflect that unresolved claims to water in the Gila adjudication by Indian tribes, or the United States acting on their behalf, exceed 2.8 million acre-feet annually, while in the Little Colorado adjudication the Hopi and Navajo Indian tribes claim more than 380,000 acre-feet annually. These figures do not include claims for unquantified amounts of groundwater. The surface water supply is woefully insufficient to satisfy even the Indian claims, let alone other existing uses; typically, the annual surface water supply is approximately 1,300,000 acre-feet in the Gila River basin and less than 180,000 acre-feet in the Little Colorado River basin. *See* U.S. Geological Survey, Water Supply Paper No. 2300, *National Water Summary 1985 – Hydrologic*

II. THE RULINGS BELOW

In 1986, the trial court judge in the Gila River adjudication identified various legal issues that he would resolve before proceeding to adjudicate individual claims. One such issue is whether federal reserved rights apply to groundwater. The trial court ruled in 1988 that "federal reserved water rights apply to both surface water and groundwater sources on and off the reservation whose diversion affects reservation sources, to the extent that there is not enough water left to satisfy the reservation's purpose, or P.I.A. [practicably irrigable acreage] if the land is an Indian reservation." App. D23.

In 1989 the Arizona Supreme Court adopted a special procedural order providing for interlocutory appeals and certifications of important legal issues decided by the trial court. The procedural order is reproduced as Appendix A to the decision in *In re the Rights to the Use of the Gila River*, 830 P.2d 442, 456-59 (Ariz. 1992) ("*Gila River I*").[6] Pursuant to this order, in 1990 the Arizona Supreme

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Events and Surface-Water Resources 145-146 (1986); Report of Simon H. Rifkind, Special Master, *Arizona v. California*, No. 8 Original, Dec. 5, 1960, finding of fact no. 10, at 337 ("The Gila River, San Francisco River, and San Simon Creek are overappropriated, supply being insufficient to satisfy existing needs"); Soil Conservation Service, U.S. Dep't of Agriculture, *Report on Water Use in the Little Colorado Basin*, App. 2, at 5-17 (1981).

[6] In agreeing to "review the important legal decisions of the trial court as promptly as practicable at the outset of the adjudication," the Arizona Supreme Court explained: "In a case of this magnitude, which is expected to continue for at least three or four decades, it is imperative that any significant error be corrected immediately to avoid conducting forty years of litigation only to discover the need to begin anew." *Gila River I*, 830 P.2d at 445 n. 2.

Court granted interlocutory review of the trial court's decision extending the federal reserved rights doctrine to groundwater; the Supreme Court designated the question as Issue 4 and stated it as follows: "Is non-appropriable groundwater subject to federal reserved rights?" *See* App. A8 n. 2; *Gila River I*, 830 P.2d at 445.[7] Issue 4 was answered by the Arizona Supreme Court in its opinion filed on November 19, 1999, in which the court held that federal reserved rights to water "extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a [federal] reservation." App. A30.[8]

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[7] For purposes of briefing and oral argument, the Arizona Supreme Court consolidated Issue 4 with Issue 5: "Do federal reserved rights holders enjoy greater protection from groundwater pumping than holders of state law rights?" App. A8 n. 2. The Arizona Supreme Court decision of November 19, 1999 answered Issue 5 in the affirmative. *See* App. A6, A30. This petition does not seek review of the ruling by the Arizona Supreme Court on Issue 5.

[8] In both the trial court and the Arizona Supreme Court, the petitioners herein argued that the doctrine of federal reserved water rights does not apply to groundwater. The respondents herein – the United States, the various Indian Tribes, and Silas Kisto, an individual Native American – argued in favor of the application of the doctrine to groundwater. The remainder of the parties to the proceeding before the Arizona Supreme Court argued against extending the doctrine to groundwater. *Gila River III* was issued in the Gila River adjudication. Issue 4 has not been addressed in the Little Colorado adjudication. However, since the same question arises in both the Gila River and Little Colorado River adjudications pending in Arizona, parties from both proceedings submitted briefs to the Arizona Supreme Court on Issue 4 and, therefore, parties to both cases are listed as parties in this petition.

In the decision below, the Arizona Supreme Court recognized that this Court has never held that there is a federal reserved right to groundwater, App. A19, and that the Supreme Court of Wyoming, in *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) ("*Big Horn*"), *aff'd on other grounds by an equally divided Court sub nom. Wyoming v. United States*, 492 U.S. 406 (1989), declined to find a reserved right to groundwater. App. A16. According to the Arizona Supreme Court, however, this Court's previous decisions on the doctrine of federal reserved water rights lead to the conclusion that the doctrine applies not only to surface water but to groundwater. App. A19 – A23. The decision below therefore rejected the holding entered by the Wyoming Supreme Court in *Big Horn*. App. A24, A30.

REASONS FOR GRANTING THE WRIT

I. APPLICABILITY, IF ANY, OF THE FEDERAL RESERVED RIGHTS DOCTRINE TO GROUNDWATER IS AN IMPORTANT FEDERAL QUESTION OF FIRST IMPRESSION THAT HAS PROMPTED CONFLICTING STATE COURT DECISIONS

The doctrine of federal reserved water rights was recognized by this Court in 1908 in *Winters*. The Court held that when the Fort Belknap Indian Reservation was established in 1888 in what was then the Territory of Montana, the United States had, by implication, reserved sufficient unappropriated water from the Milk River, which flowed through the reservation, to accomplish the reservation's purpose. 207 U.S. at 576-77. Subsequent

decisions of the Court refined the nature and scope of the federal reserved water rights doctrine. *See Arizona v. California; United States v. District Court for Eagle County*, 401 U.S. 520 (1971); *Cappaert; United States v. New Mexico*, 438 U.S. 696 (1978).

With respect to the scope of *Winters* rights, *Cappaert* explained that the federal reserved rights doctrine applies to "appurtenant water then unappropriated" in navigable and nonnavigable streams. 426 U.S. at 138. Although *Cappaert* held that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater," *id.* at 143, the Court found that the reserved water right sought to be protected in *Cappaert* was "surface water." *Id.* at 142. *Cappaert* specifically recognized that "[n]o cases of this Court have applied the doctrine of implied reservation of water rights to groundwater" and did not purport to determine whether groundwater is subject to the reserved rights doctrine. *Id.*

As recognized by the decision below, the nature and scope of federal reserved rights are questions of federal substantive law. App. A15. In the absence of a binding federal court decision, the issue of the applicability of the doctrine of federal reserved rights to groundwater has been addressed by state courts in an effort to interpret and predict federal law. The Supreme Court of Wyoming concluded in *Big Horn* that there is no federal reserved right to groundwater. 753 P.2d at 100.[9] In the decision

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[9] The *Big Horn* case, like *Gila River III*, arose out of a system-wide adjudication of water rights, including reserved rights of

below which is the subject of this petition, the Supreme Court of Arizona reached the opposite conclusion. App. A30. The situation presented by this petition falls squarely within the provisions of Rules 10(b) and 10(c) of the Rules of this Court since there is a direct conflict between the courts of last resort of Wyoming and Arizona on an important question of federal law that has not been, but should be, settled by this Court.

The conflict between *Big Horn* and the decision below on the question presented by this petition was addressed in a dissenting opinion in *Confederated Salish and Kootenai Tribes v. Clinch*, No. 97-609, 1999 WL 1271753 (Mont. Dec. 30, 1999). The majority of the Supreme Court of Montana enjoined the Montana Department of Natural Resources and Conservation ("DNRC") from issuing water use permits on the Flathead Indian Reservation until tribal water rights have been quantified. 1999 WL 1271753 at *6. The dissenting justice stated in part:

> The majority's holding apparently precludes DNRC from issuing permits for groundwater use . . . even though uncertainty exists as

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the United States and the Arapaho and Shoshone Indian tribes. In the trial court, the Indian tribes claimed an alleged reserved right to make existing and future use of groundwater. The trial court decided that there is no federal reserved right to groundwater. 753 P.2d at 100. That decision was appealed by the United States and the tribes to the Wyoming Supreme Court, which upheld the trial court ruling and specifically held that "the reserved water doctrine does not extend to groundwater". *Id.* The Indian tribes unsuccessfully asked this Court to review the Wyoming Supreme Court's ruling rejecting a reserved right to groundwater. *See Shoshone Tribe v. Wyoming*, 57 U.S.L.W. 3319 (U.S., Nov. 1, 1988) (questions presented in cross-petition for certiorari), *cert. denied*, 492 U.S. 926 (1989).

> to whether groundwater is included within the reserved rights doctrine. *See Big Horn* . . . and . . . *Gila River* [*III*]. . . . Without analysis, the majority apparently assumes that groundwater is included within the Tribes' reserved water right.
>
> The practical consequences of the majority's decision will be significant and will deprive some Montana citizens of one of life's basic necessities, the use of water.

1999 WL 1271753 at *7 (Rodeghiero, J., dissenting).

Resolution by this Court of the issue presented will have a significant impact throughout the United States. According to the map submitted with this petition as Appendix H, the federal domain covers one-third of the nation. As reflected in the map, the number and size of federal reservations are particularly extensive in the western states.[10] For example, more than half of

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[10] To further illustrate the scope of federal reservations in the West, the following table sets forth the approximate acreage reserved by the federal government for Indian reservations and national forests in selected states. Numbers exceeding one million have been rounded to the nearest one million. The other numbers have been rounded to the nearest 100,000.

State	Total area	Tribal land	National forest
Arizona	73,000,000	20,000,000	11,000,000
California	102,000,000	500,000	21,000,000
Colorado	67,000,000	800,000	14,000,000
Idaho	53,000,000	400,000	20,000,000
Montana	94,000,000	3,000,000	17,000,000
Nevada	71,000,000	1,000,000	6,000,000
New Mexico	78,000,000	8,000,000	9,000,000
Oregon	62,000,000	700,000	16,000,000
Utah	54,000,000	2,000,000	8,000,000
Washington	44,000,000	2,000,000	9,000,000

the land in Arizona consists of federal reservations. *See supra* note 10; University of Arizona, *Arizona Statistical Abstract* 173-177 (1993); App. I, J (maps showing categories of land ownership in Arizona). Moreover, throughout Arizona and other western states, the federal reservations are interspersed with other types of lands, including federal holdings not constituting reservations. *See* App. H-J. In view of the number, size and location of federal enclaves and the finite supply of water in arid states, the issue presented in this petition is of direct and substantial importance to the entire western region of the United States.

Further, water rights adjudications involving claims to federal reserved water rights are pending in the states of Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah and Washington, in addition to Arizona.[11] By resolving the applicability of the reserved rights doctrine to groundwater, this Court will answer a question that is

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See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1998* at 237 (118th ed. 1998); Division of Real Estate Services, Bureau of Indian Affairs, *Annual Report of Indian Lands* (Dec. 31, 1997) <http://www.doi.gov/bia/realty/report97.html>; U.S. Dep't of Agriculture, *Land Areas of the National Forest System As of September 1997* at 14-35 (1998). In addition to Indian reservations and national forests, the federal government owns tens of millions of acres in western states in a wide variety of other enclaves, such as military bases, research facilities, national parks, monuments, wildlife refuges, recreation areas, wilderness areas, and grasslands. *See* App. H.

[11] *See* A. Lynne Krogh, *Water Right Adjudications in the Western States: Procedures, Constitutionality, Problems & Solutions*, 30 Land & Water L. Rev. 9 (1995); Peter W. Sly, *Reserved Water Rights Settlement Manual* 194-211 (1988).

of critical importance to the completion of numerous cases.

The issue presented is also of potential importance in eastern and midwestern states. Collectively, those states account for more than sixty Indian reservations and hundreds of other federal enclaves, including national parks, national forests, and military installations. *See* App. H. As the United States population continues to grow, availability of an adequate supply of water becomes increasingly critical in every geographic region of the nation. Indian tribes, meanwhile, are becoming more active in seeking to develop their lands and increase their water usage. "[T]he basic questions regarding how and if the *Winters* doctrine applies in eastern states remain unresolved." Jim Shore & Jerry C. Straus, *The Seminole Water Rights Compact and the Seminole Indian Land Claims Settlement Act of 1987*, 6 J. Land Use & Envtl. L. 1 (1990).

II. THE DECISION BELOW WOULD CREATE GRAVE, UNIQUE PROBLEMS THROUGHOUT ARIZONA

Extending the federal reserved rights doctrine to nonappropriable groundwater raises the prospect of entitling a few large Indian reservations established in the nineteenth century to monopolize the supply of groundwater in Arizona. The consequences could be disastrous for most of Arizona, including not only cities, industries, and farmers, but also state trust lands and many other federal reservations. Creating a privileged class of a few federal pumpers of groundwater would also produce discriminatory, anomalous results.

An appreciation of the havoc that would be wreaked by the lower court's decision requires an examination of Arizona's water supply and demand, basic hydrology, and the pattern and history of land ownership in Arizona. The fundamental problem is that water demand in Arizona exceeds the supply. "[T]here is not enough water to meet everyone's demands." *Superior Court*, 697 P.2d at 663.

Groundwater is and will remain an important component of Arizona's mix of water resources. "[T]he people of Arizona are dependent in whole or in part upon groundwater basins for their water supply. . . . " A.R.S. § 45-401.A. "Groundwater is the primary water supply in most areas of the State." *ADWR Assessment, supra*, at 9. Many Arizona cities and towns, as well as various industrial users, must rely extensively on groundwater because they have no practical, affordable alternative. *See id.* at 6, 52.

On average, groundwater withdrawals exceed natural recharge to Arizona's aquifers. *See* A.R.S. § 45-401.A; *ADWR Assessment* at 9, 51. In response to a water shortage, twenty years ago the Arizona Legislature enacted the Groundwater Code, which is designed to conserve and protect groundwater supplies. A.R.S. § 45-401.B.

Nearly all of the groundwater in Arizona is located in large aquifers underlying vast expanses of the state. *See* App. G; *ADWR Assessment* at 5-10. The aquifers constitute a common source of supply for overlying lands. *See* App. J; *ADWR Assessment* at 9-10. In response to gravity and pressure, groundwater flows considerable distances

through aquifers. *See* 3 *Waters and Water Rights* § 18.02 (Robert E. Beck ed. 1991); Leonard Rice and Michael D. White, *Engineering Aspects of Water Law* 123-24 (1987). Aquifers are not static reservoirs; they are dynamic systems that receive an inflow of recharge, transmit groundwater across large distances, and discharge groundwater through seeps and springs into surface water sources. *Waters and Water Rights*; Rice & White at 119, 124. Pumping from an aquifer causes both local and regional drawdowns in the water table that affect adjacent lands. *Waters and Water Rights* § 18.03, at 13-14; Rice & White at 125-26.

As a result of an interlocking pattern of land ownership, operation of a well in Arizona commonly affects various categories of land. In much of Arizona, Indian reservations and other federal lands are interspersed with state and private lands in a checkerboard pattern overlying a common aquifer. *See* App. G, I, J.[12] Under these circumstances, groundwater withdrawals by one landowner unavoidably diminish the supply available to other lands sharing the same aquifer. The affected lands include cities, such as the Phoenix and Tucson metropolitan areas, which are in close proximity to federal reservations.

Because this Court has held that a federal reserved right to surface water vests when the reservation is

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[12] Nearly three-fourths of the land in Arizona is owned by the federal government, including numerous Indian reservations, national parks, national monuments, historic sites, recreation areas, wildlife refuges, national forests, military installations, and public domain under the jurisdiction of the Bureau of Land Management. App. A14, I, J.

established (*see, e.g., Cappaert*, 426 U.S. at 138), the date on which a given reservation was created is potentially of great importance in determining associated water rights. Creation of federal enclaves in Arizona has spanned more than 100 years and is continuing to the present. The Gila River Indian Reservation, for instance, was initially established in 1859 and subsequently was enlarged on seven occasions from 1876 to 1915. *Gila River Pima-Maricopa Indian Community v. United States*, 494 F.2d 1386, 1388 (Ct. Cl.), *cert. denied*, 419 U.S. 1021 (1974). Other examples of federal reservations in Arizona established in the nineteenth century include:

- Navajo Reservation, 1868. 15 Stat. 667 (1868) (Treaty with the Navajo).
- White Mountain Apache Reservation, 1871. *United States v. Wightman*, 230 F. 277, 278 (D. Ariz. 1916).
- San Carlos Apache Reservation, 1872. *Wightman*, 230 F. at 278.
- Fort Huachuca, 1881 and 1883. Executive Orders of October 29, 1881 and May 17, 1883. *See List and Index of Presidential Executive Orders: Unnumbered Series (1789-1941)*, at 98, 105 (Clifford L. Lord ed., Michael Glazier, 1979) (1944).
- Hopi Reservation, 1882. *See* 1 Charles J. Kappler, *Indian Affairs: Laws and Treaties* 805 (1904); *see also* Act of June 14, 1934, 48 Stat. 960, 961.

Relatively recent Indian reservations in Arizona include the Tonto Apache Reservation and the Zuni Heaven Reservation, which were authorized by Congress

in 1972 and 1984, respectively. *See* Pub. L. 92-470, 86 Stat. 783; Pub. L. 98-498, 98 Stat. 1533. Just last month, President Clinton established the Agua Fria National Monument, which consists of approximately 71,000 acres in central Arizona. Proclamation No. 7263, 65 Fed. Reg. 2817 (2000). The presidential proclamation establishing the new monument contains the following provision regarding water rights: "There is hereby reserved, as of the date of this proclamation and subject to valid existing rights, a quantity of water sufficient to fulfill the purposes for which this monument is established." *Id.* at 2818.

The ruling below will also directly affect the State of Arizona, which owns land in every area of the state. In 1850, Congress "reserved for the purpose of being applied to schools" in the Territory of New Mexico, which included the land that subsequently became the State of Arizona, sections 16 and 36 of every township.[13] This reservation of land for school purposes was expressly extended to the Territory of Arizona upon its creation by Congress in 1863.[14] When Arizona became a state, it received a grant from the federal government of sections 2, 16, 32 and 36 in every township for the support of public schools, plus specified acreages for other designated purposes. *See* Arizona Enabling Act of June 20, 1910, 36 Stat. 557, 572 (1910); *Lassen v. Arizona*, 385 U.S. 458, 460 n. 2 (1967). The granted lands are held by the state in trust. *Fain Land & Cattle Co. v. Hassell*, 790 P.2d

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[13] Act of Sept. 9, 1850, §§ 2, 15, 9 Stat. 446, 447, 452.

[14] Act of Feb. 24, 1863, §§ 1-2, 12 Stat. 664, 665.

242, 244 (Ariz. 1990).[15] Many of the state parcels are part of a checkerboard pattern with federal lands. *See* App. I, J.

With this background, it is evident that subjecting Arizona groundwater to a federal reserved rights doctrine that includes a priority scheme that does not apply to groundwater rights based upon state law would create a plethora of serious problems.[16] First, under the decision below, most of the heretofore non-appropriable groundwater would be controlled by a few federal enclaves that were established many years ago. Most other landowners, despite longstanding dependence upon groundwater usage consistent with state law, would be forced to

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[15] Disposal of the trust lands is subject to very restrictive conditions that were imposed by Congress in the Enabling Act. *Hassell*, 790 P.2d at 244.

[16] In the decision below, the Arizona Supreme Court did not expressly hold that federal reserved rights to groundwater have priority dates. However, the court appears to have assumed, without stating, that any federal reserved right to groundwater vests when a reservation is established, regardless of the timing and extent of historic pumping, if any, by the reservation. In describing the reserved rights doctrine, the court below quoted the passage in *Cappaert* that "a reserved right [to surface water] . . . vests on the date of the reservation and is superior to the rights of future appropriators." App. A15 (quoting 426 U.S. at 138). The court below also stated that "once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion . . . . " App. A27. If this Court determines that there are no federal reserved rights to groundwater, or alternatively, that such rights exist but are governed by Arizona law, which does not allocate groundwater based upon a priority scheme, the problems discussed in this petition would be much less significant.

cease or sharply curtail their pumping, causing extensive dislocation and hardship.[17]

Second, some of the landowners with junior rights who would be adversely affected by the decision below are federal enclaves that rely heavily on groundwater due to their geographical location or lack of rights to sufficient surface water. An example of this type of conflict would be in the vicinity of Tuba City, Arizona, where pumping from the N Aquifer for use on a portion of the Navajo Reservation established in 1900 diminishes the supply available to the Hopi Reservation established in 1882. A second illustration is competing uses by the

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[17] One of the earliest and largest federal enclaves is the Gila River Indian Reservation, which consists of approximately 374,000 acres located in central Arizona near the Phoenix metropolitan area. The Gila River Indian Community ("GRIC") has filed a claim in the Gila River adjudication for more than 1,500,000 acre-feet of water, a quantity exceeding the average annual water supply of the Gila River which flows through portions of the reservation. Historically, the water needs of the reservation were served primarily by surface water flows. *Gila River Pima-Maricopa Indian Community v. United States*, 684 F.2d 852, 854 (Ct. Cl. 1982). The metropolitan areas located in close proximity to the reservation use substantial quantities of groundwater to meet their municipal needs. *See ADWR Assessment, supra*, at 75-81. In a filing in the trial court just last month, GRIC stated that it "demands that the Salt River Project . . . and all other non-Indians, halt all pumping of underground water that interferes with the water supply and water rights of the Community, and its members and Allottees, in accord with the recent decision of the Arizona Supreme Court on Interlocutory Issues 4 and 5." Response in Opposition to the Motion for Partial Summary Judgment Re Preclusive Effect of 1907 Sacaton Agreement at 12 (Jan. 26, 2000).

Navajo and Zuni Heaven Indian reservations. *See supra* p. 18.

Ironically, while the rationale of the reserved rights doctrine is that the United States implicitly reserved water needed to accomplish the purpose of each reservation, extending the federal reserved rights doctrine to groundwater would lead to defeating the purpose of some federal enclaves. Under the approach adopted in the decision below, pumping of groundwater by relatively new federal enclaves must yield to more senior federal landowners who may eventually "need" the water, even if the pumping causing interference is consistent with state law and is necessary to fulfill the purpose of the more recent reservation. Similarly, to the extent that state trust lands become victims of giving senior federal enclaves a reserved right to groundwater, the decision below may impede fulfillment of Congress' purpose in reserving territorial lands in 1850 and subsequently granting millions of acres to Arizona for long term support of schools and other public purposes when the state entered the Union.

Third, the decision below lacks mutuality and unfairly discriminates against groundwater pumpers who lack senior federal reserved rights. Under the application of federal reserved rights adopted by the Arizona Supreme Court, a federal enclave having a senior priority date to groundwater can limit or prohibit pumping by adjacent landowners. The court did not adopt the converse, however. Landowners in Arizona whose pumping is based upon state law have no right to limit pumping by others – federal reservations, private landowners, or the

State of Arizona – that have more recent priority dates but are complying with state law.

Fourth, unlike federal reserved rights to appropriable water, which share many of the attributes of state law appropriative rights and are plugged into the state law system of administration of surface water, administering federal reserved rights to groundwater in Arizona would necessitate creation of a new common law system unique to such rights and antithetical to state law rights to groundwater. As a practical matter, Arizona would be forced to abandon existing state law governing groundwater and substitute a priority scheme.

III. THE RULING BELOW IS NOT MANDATED BY PREVIOUS DECISIONS OF THIS COURT AND UNNECESSARILY SUPPLANTS STATE LAW

It is not necessary to give the earliest federal reservations a privileged position over other federal, state and private landowners dependent upon groundwater in Arizona. State law should be borrowed as the federal rule of decision governing use of groundwater by federal enclaves. Adopting state law is appropriate where, as here, there is no need for a uniform national rule, application of state law would not frustrate federal policy or functions, and creation of an inconsistent federal rule could be disastrous for the state and private landowners and even for many federal enclaves. *See, e.g., Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79 (1994).

In the opinion below, the Arizona Supreme Court rejected borrowing state law as the rule of decision for federal rights to groundwater, reasoning that this Court's decisions in *United States v. New Mexico*, *Cappaert*, and *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899) preclude deference to state water law when the reserved water rights doctrine is at issue. App. A20-A24.

Petitioners respectfully disagree with the Arizona Supreme Court's analysis of this Court's previous decisions. With the exception of the Colorado River, which is governed by unique rules, all of this Court's cases establishing and defining federal reserved water rights involved surface water subject to the doctrine of prior appropriation under state law. With respect to surface water, limiting federal reservations to state law appropriative rights would preclude many of them from diverting such water; under a priority system based upon dates of diversion and beneficial use, appropriative rights of many federal reservations would be too junior to be satisfied. With respect to groundwater, however, it is not necessary to depart from Arizona law. Each federal reservation in Arizona is entitled by state law to pump sufficient groundwater from beneath its land to fulfill its purpose.[18]

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[18] As explained *supra* p. 6, the doctrine of reasonable use does not include a priority system. It permits an overlying landowner to capture as much groundwater as can reasonably be used on the overlying land. With respect to federal enclaves in Arizona that are located in whole or in part within an AMA, in which state law restricts development of new wells and expansion of agricultural land irrigated with groundwater, petitioners note that the state has never attempted to enforce the

Moreover, a consistent theme in this Court's decisions on federal reserved water rights has been to *integrate* federal water rights into the various state law systems and minimize interference with state law rights. After a federal reserved right is established and quantified, it is administered in essentially the same manner as rights that are based upon the doctrine of prior appropriation. Under the decision below, however, such integration of groundwater rights would be impossible. Groundwater rights that are based upon a priority scheme cannot be integrated with a state law system that does not recognize priority dates. Implementing the decision below would inevitably disrupt the state law system and compel abandoning it in favor of a priority scheme for all pumpers. It is highly improbable that Congress and the executive branch, in creating federal enclaves in Arizona, implicitly viewed the state's doctrine of reasonable use as being inadequate and intended to supplant state law with a fundamentally different and inconsistent regime to govern use of groundwater by federal reservations.

Furthermore, although the *Winters* doctrine developed in response to the prior appropriation system followed in the West, the specter of *Winters* rights also haunts states which follow the riparian system. For example, the State of Florida has adopted a hybrid statutory

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Groundwater Code on federal reservations, and in any event each reservation within an AMA apparently meets the requirements under the Code for grandfathered rights which, coupled with the reservation's other water rights, should provide the reservation with access to a sufficient quantity of water to fulfill the reservation's purpose.

permit system to integrate water allocation characteristics of the prior appropriation doctrine into the traditional riparian system. *See* Shore & Straus, *supra*, at 9. In order to avoid litigating the application of *Winters* rights in Florida, the State of Florida and the Seminole Tribe of Florida agreed to a settlement of then-pending litigation by entering into a water rights compact that recognized and defined federal water rights for the tribe. *Id.* at 2. Under the compact, the tribe achieved state and federal recognition of substitute federal water rights in exchange for alleged *Winters* doctrine rights. *Id.* at 12. The effect was to adopt state law as the federal rule. Under the compact, the tribe regulates its own water use but must follow the essential aspects of Florida's groundwater management plans and federal environmental laws. *Id.* at 12-13. Thus, the tribe's rights are integrated into the Florida system without unduly interfering with existing rights that are based upon state law.

The result achieved by the Florida-Seminole compact can only be achieved throughout the United States if this Court applies state law as the federal rule of decision where necessary to integrate federal rights into state law systems that are incompatible with the *Winters* doctrine. This would then provide a workable resolution to the problems created by attempting to integrate federal and state water claims in jurisdictions such as Arizona where different legal rights attach to different categories of water under state law.[19]

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[19] Thirteen of the nineteen western states that apply the doctrine of prior appropriation extend its application to all hydrologically connected surface water and groundwater.

Finally, extending the *Winters* doctrine to groundwater fails to consider fundamental differences between surface water and percolating groundwater. It is logical to assume that in establishing federal reservations in the nineteenth and early twentieth centuries, the United States intended to use unappropriated surface water, which was the only known water source available and was readily ascertainable, in order to fulfill the purpose of the reservation. It is not plausible, however, to assume that the federal government intended to rely upon a water source, such as groundwater, that was virtually unknown when the reservation was established.[20]

Alaska Stat. § 46.15.030 (1987); Colo. Rev. Stat. § 37-92-102 (Supp. 1987); Idaho Code §§ 42-101, -103, -226, -229, -230 (Supp. 1988); Kan. Stat. Ann. §§ 82a-703, -707 (1984); Mont. Code Ann. §§ 85-2-101, -102(191) (1999); Nev. Rev. Stat. §§ 533.025, -.030, 534.020 (1995); N.M. Stat. Ann. § 72-12-1 (1997); N.D. Cent. Code § 61-01-01 (1995); Or. Rev. Stat. §§ 537.120, -.515, -.525, -.535 (1997); S.D. Codified Laws Ann. §§ 46-1-1 to 46-1-3 (1999); Utah Code Ann. §§ 73-1-1 (1989); Wash. Rev. Code Ann. §§ 90.03.010, 90.44.020, 90.44.035, 90.44.040 (1987); Wyo. Stat. §§ 41-3-101, -901, -905, -930, -936 (1999); Leshy & Belanger, *supra*, at 725 n. 453. However, in addition to Arizona, a number of other western states apply different legal principles to various categories of surface water and groundwater. *See generally* 6 *Waters and Water Rights*, *supra*, at 246 (1994) (discussing California's correlative rights to groundwater); *City Mill v. Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929) (adopting correlative rights to groundwater) and Haw. Rev. Stat. Ch. 164C (establishing administrative control over groundwater when sustainable yields are threatened); Okla. Stat. tit. 60, § 60; Neb. Rev. Stat., ch. 46, art. 6; *Denis v. Kickapoo Land Co.*, 771 S.W.2d 235 (Tex. App. 1989, *writ. denied*).

[20] Not until the late 1800s did groundwater pumping in Arizona begin on even a limited scale. T.W. Anderson, *et al.*, U.S.

Further, groundwater is "[l]ike wild animals free to roam as they please" and is "the property of no one." *Town of Chino Valley*, 638 P.2d at 1328. The decision below is akin to prohibiting off-reservation hunting of migratory game that may eventually move onto a federal reservation. It is settled, however, that an Indian tribe or other federal reservation cannot claim to "own" wild game, even when the animals are present on the reservation. *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1283 (9th Cir. 1981). "If the fish and game are migratory, the state interest becomes quite powerful." *Id.* Likewise, this Court should refuse to extend the federal reserved rights doctrine to groundwater, which is migratory and not subject to ownership until it has been captured and withdrawn from the underground supply.[21]

Geological Survey, Professional Paper 1406-B, *Geohydrology and Water Resources of Alluvial Basins in South-Central Arizona and Parts of Adjacent States* B25, B62 (1992). Major pumping did not begin until the development of deep-well turbine pumps in the 1930s. *Id.* at B26.

[21] Numerous difficulties would be inherent in attempting to reserve groundwater for federal reservations. The exact flow of groundwater is difficult if not impossible to determine. *See* A. Dan Tarlock, *Law of Water Rights and Resources* § 4.03 (1999). In addition, pumping can induce groundwater to flow to a federal reservation and away from other lands, or vice versa. *See* 3 *Waters and Water Rights*, *supra*, at 13-14; Rice & White, *supra*, at 125-26; App. J. For a general discussion of fundamental differences between surface water and groundwater that militate against extending the reserved rights doctrine to groundwater, see Lamond R. Mills, *Federally Reserved Rights to Underground Water – A Rising Question in the Arid West*, 1973 Utah L. Rev. 43, 52-53.

CONCLUSION

As recognized in the decision below, this Court has not ruled on the federal question at issue – whether the federal reserved water rights doctrine applies to groundwater. This Court has also never rejected borrowing state law as the federal rule of decision where doing so will preserve state law and not frustrate a federal purpose. Petitioners respectfully submit that it is now time for this Court to decide this uniquely federal issue in order to resolve the direct conflict between the decisions of the supreme courts of Wyoming and Arizona and to provide guidance to courts that are attempting to integrate federal rights to water into state water law systems that apply different legal rules to different categories of water. It is unlikely that this Court will ever be presented with a more concrete example of the potentially disastrous impact of an unfettered application of the federal reserved water rights doctrine. Therefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

PHELPS DODGE CORPORATION, ET AL.,

Petitioners,

v.

THE UNITED STATES, ET AL.,

Respondents.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, ET AL.,

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On Petitions for Writs of Certiorari to the Supreme Court of the State of Arizona

RESPONSE OF THE STATE OF ARIZONA IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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INTRODUCTION

The State of Arizona agrees with Petitioners that this Court should grant certiorari to settle a question of vital importance to the rapidly increasing populations of Arizona and other arid western states: How should federal water needs be integrated into a non-appropriative state groundwater management scheme? In answer to the question, the Arizona Supreme Court extended to groundwater the federal reserved-right-to-water doctrine that this Court had previously applied only to appropriable surface waters. *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. and Source*, 989 P.2d 739, 751 (Ariz. 1999) ("*Gila River III*").

The court arrived at this answer in error because it failed adequately to consider two important aspects of Arizona water law. First, the court did not consider it significant that Arizona law does not authorize the appropriation of groundwater, although heretofore an appropriative scheme has been an essential predicate to this Court's implication of a reserved right. Second, the court disregarded the State's comprehensive statutory scheme to manage its groundwater as a public resource, which fairly allocates groundwater supplies while ensuring that no party, federal or state, drains an aquifer dry. Consequently, the *Gila River III* decision unnecessarily displaced state law and created a class of federal rights with priority over all other rights and the arguable legal right to drain completely an aquifer on which many mutually depend. This rule unfairly prefers federal water users and interferes with Arizona's ongoing groundwater management strategies. This Court should review the

Gila River III decision to clarify the parameters of the reserved-right-to-water doctrine for the benefit of Arizona and the many courts and litigants adjudicating water rights throughout the West.

STATEMENT OF THE CASE

I. Factual and Legal Background.

A. In Arizona, Groundwater Is an Essential, Nonrenewable Resource.

Precipitation in the West is both infrequent and highly variable.[1] Surface water supplies are therefore scarce, and frequently are over-appropriated.[2] "Water

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[1] Western Water Policy Review Advisory Commission Rep., *Water in the West: Challenge for the Next Century* at 2-4 (1998) (hereafter "*Water in the West*"). For example, although the mean annual flows of the Colorado River at Lees Ferry have been approximately 10.4 million acre-feet since the construction of Glen Canyon Dam, annual flows vary from a record low of approximately 4.4 million acre-feet to a record high of approximately 20.4 million acre-feet. 2 Arizona Dep't of Water Resources, *Arizona Water Resources Assessment, Hydrologic Summary* 47 (1994) (hereafter "*Assessment, Vol. II*").

[2] In approximately half of the American West, as of 1986, water use exceeded stream flow during years of average precipitation. John E. Thorson, *Resolving Conflicts Through Intergovernmental Agreements: The Pros and Cons of Negotiated Settlements, in Indian Water 1985: Collected Essays*, 25, 26-27 (1986). The Gila and Salt Rivers, which are the subject of this action, are fully appropriated and inadequate to meet the region's water needs. John A. Folk-Williams, *What Indian Water Means to the West, 1 Water in the West* (1982) (hereafter "*What Indian Water Means to the West*"), at 34, 36.

usage in Arizona exceeds available surface supply by three-fold in average years and by more in dry years." *United States v. Superior Court*, 697 P.2d 658, 663 (Ariz. 1985).

Scarce water is becoming ever more precious due to explosive population growth.[3] These new residents have collected in a series of "urban archipelagos" – areas of high population density surrounded by large, sparsely populated rural areas, in many cases far from available surface water. *Water in the West*, at 2-15. Water often must be moved many miles from its point of origin to point of use, and must be stored during years of plenty so that it will be available in times of drought. 1 Arizona Dep't of Water Resources, *Arizona Water Resources Assessment, Inventory and Analysis* at 52 (1994) (hereafter "*Assessment, Vol. I*"). Many Arizona communities with no renewable water supplies rely primarily on groundwater because they have "no practical, affordable alternative." *Assessment, Vol. I*, at 52. In fact, groundwater "is the primary water supply in most areas of the State." *Assessment, Vol. I*, at 9. From 1986-1990, groundwater accounted for approximately 50% of all water use in Arizona. *Id.* at 10.

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[3] The West is now home to nearly one-third of the American population. *Water in the West*, at 2-14. Over the past 25 years the populations of western states grew at a rate almost twenty times that of the rest of the nation, and the West is projected to add another 28 million residents by the year 2025. *Id.* Between 1990 to 1994, Arizona was the third-fastest growing state in the nation, with a population growth rate of 11.2%, and populations concentrated in the Phoenix and Tucson metropolitan areas. *Id.*

Other western states also depend heavily upon groundwater.[4]

Fortunately a vast reservoir of underground water underlies virtually the entire State of Arizona.[5] The U.S. Geological Survey has estimated that Arizona has approximately 1.9 billion acre-feet of water stored underground. David A. de Kok, *The Geography of Water Availability and Use in Arizona, in Ensuring Arizona's Water Quantity and Quality Into the 21st Century* 30, 34 (1997) (hereafter *"The Geography of Water Availability"*). Although there is some natural and artificial groundwater recharge, most of Arizona's groundwater reservoir has been in storage for thousands of years. *Assessment Vol. I*, at 9.

Flexible strategies to manage groundwater and surface water in a coordinated way that makes water available at the right time and place to meet demand are essential to allow continued economic growth and development throughout the State. *Assessment, Vol. I*, at 52-53.

B. Arizona Law Has Adapted to Provide Effective Groundwater Management Appropriate to Local Circumstances.

Arizona today administers its groundwater resources under one of the most comprehensive groundwater

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[4] Groundwater contributes about one third of the total water supply in the 19 western states, and approximately 87% of the self-supplied domestic water. *Water in the West*, 2-7.

[5] U.S. Geological Survey, *Annual Summary of Ground-Water Conditions in Arizona, Spring 1984-1985*, USGS Open-File Report 86-422W (1986); Appendix to Petitions for Writs of Certiorari ("App."), App. G.

management systems in the United States.[6] The Arizona Legislature enacted the Arizona Groundwater Code, Arizona Revised Statutes ("A.R.S.") §§ 45-401 to -704, in 1980 after decades of groundwater overdraft led to significant decline in water tables in some critical areas.[7] The Legislature has acknowledged the State's dependence upon groundwater and the dangers of aquifer depletion, and has set a goal of balancing withdrawals and recharges of those aquifers by the year 2025. *See* A.R.S. § 45-401; *Assessment, Vol. I* at 55-56. This balance is to be achieved

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[6] One commentator has referred to the Groundwater Code as "[p]erhaps the most comprehensive groundwater code in the nation." Jeffrey Gross, *Transboundary Water Quantity: The Effect of Arizona and Mexican Groundwater Law on Arizona's Agriculture*, 1988 Ariz. J. Int'l & Comp. L. 189, 190.

[7] Extensive groundwater pumping began shortly after the development of efficient turbine pumps. T.W. Anderson, et al., U.S. Geological Survey, Professional Paper 1406-B, *Geohydrology and Water Resources of Alluvial Basins in South-Central Arizona and Parts of Adjacent States* 26 (1992). In 1923 pumping exceeded 500,000 acre-feet per annum and exceeded for the first time natural recharge. Pumping increased to 1 million acre-feet in 1934, 2 million acre-feet in 1945, 3 million acre-feet in 1948, 4 million acre-feet in 1953, and 5 million acre-feet in 1961, reaching an all-time high of 5.7 million acre-feet in 1974. *The Geography of Water Availability.* Prolonged periods of uncontrolled groundwater pumping between the late 1940's and the late 1970's and cumulative groundwater overdraft led to significant declines in water tables in some critical basins. Declines of 50 to 200 feet were common in the Central Arizona basin, and in some locations the water table dropped almost 500 feet. *Water in the West*, p. 2-7; *The Geography of Water Availability*, at 32-33, 36.

in part by providing for the orderly retirement of agriculture in critical groundwater basins.[8] Arizona's adoption of this comprehensive Groundwater Code, and its commitment to the Central Arizona Project ("CAP") and concomitant restrictions on groundwater use,[9] demonstrate that Arizona recognizes the importance of groundwater and will take appropriate action to conserve this precious, non-renewable resource.

The Groundwater Code establishes three levels of water management. Management is most intensive in Active Management Areas ("AMAs"), which are geographic areas where groundwater supplies are being depleted. *See* A.R.S. § 45-402(2). Each AMA is assigned a groundwater management goal that is designed to ensure the sustainability of Arizona's groundwater supplies. A.R.S. § 45-562.[10] The Groundwater Code initially established four AMAs, which accounted for 69 percent of the total groundwater overdraft in the state and included 80 percent of the State's population.[11] By amendment to the

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[8] Agriculture accounted for 79.7% of total demand for Arizona's water in 1990; that percentage is projected to decrease to 72.8% of total demand by 2015, and 66.2% of total demand by 2040. *See Assessment, Vol. I*, at 16-17.

[9] *See Assessment, Vol. I* at 55-56.

[10] Achievement or maintenance of "safe-yield," or long-term balance between annual withdrawals and recharge, is the management goal of the Phoenix, Tucson, Prescott and Santa Cruz AMAs. See A.R.S. §§ 45-561(12), -562. The management goal in the Pinal AMA is to allow some depletion "consistent with the necessity to preserve future water supplies for non-irrigation uses." A.R.S. § 45-562(B).

[11] *Cherry v. Steiner*, 543 F. Supp. 1270, 1278-79 (D. Ariz. 1982), *aff'd*, 716 F.2d 687 (9th Cir. 1983). The Tucson, Phoenix,

Code a fifth AMA was established in 1994.[12] The Department of Water Resources is authorized to establish additional AMAs where "necessary to preserve the existing supply of groundwater for future needs." A.R.S. § 45-412(A)(1). Within AMAs new uses of groundwater are generally prohibited or severely limited.[13]

The management of agricultural irrigation, both within and outside of AMAs, is also intensive. To meet the water demands of its burgeoning population without depleting non-renewable groundwater supplies Arizona already has taken painful steps to reduce agricultural uses, which have accounted for most groundwater pumping.[14] The Groundwater Code prohibits irrigation of lands that were not historically irrigated both within

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Prescott and Pinal AMAs were established as of June 12, 1980. A.R.S. § 45-411(A).

[12] The Santa Cruz AMA was established as of July 1, 1994. A.R.S. § 45-411.03.

[13] *See* A.R.S. § 45-491 to -498. While new withdrawals for domestic uses are permitted under A.R.S. § 45-492, no additional industrial uses will be allowed, except where designed to require maximum conservation. *See* A.R.S. § 45-497. Industrial users will be required to purchase and retire irrigated lands if available. *Id.* Municipalities and water companies may withdraw enough water within their service areas to serve their customers, but are restricted from extending their service areas and the types of services that they provide. *See* A.R.S. §§ 45-493(A) & (B).

[14] Robert Jerome Glennon, *Because That's Where the Water Is: Retiring Current Water Uses to Achieve the Safe-Yield Objective of the Arizona Groundwater Management Act*, 33 Ariz. L. Rev. 89, 90-91 (1991).

AMAs and outside of AMAs in areas known as "irrigation non-expansion areas" ("INAs"), where expanded withdrawals of groundwater cannot safely be supported. *See* A.R.S. §§ 45-431, -437, -452, and 45-493(C); *Cherry*, 543 F. Supp. at 1275. The Groundwater Code thus prevents expansion of the agricultural land base in those parts of the state where groundwater supplies are imperiled. As urbanization reduces the agricultural land base, groundwater consumption will also decline and renewable water supplies that have been used for agriculture will become available for other uses.

The third level of management includes laws that are generally applicable statewide. *See, e.g.*, A.R.S. § 45-403 (designation of groundwater basins); A.R.S. §§ 45-541 to -559 (restrictions on transporting groundwater from one area of the State to another); A.R.S. §§ 45-591 to -605 (mandatory well registration and construction requirements); A.R.S. § 45-108 (requirements for land developers to evaluate and report water availability, with restrictions on development in areas without an "assured water supply"). These laws operate in tandem with the doctrine of reasonable use that is applicable outside of AMAs and INAs. A.R.S. § 45-453. This doctrine allows a landowner the right to put the land to use, whether it be for irrigation, industrial enterprise or domestic homesteading, and to extract a reasonable amount of the common groundwater supply to accomplish that use. *See* A.R.S. § 45-453; *Bristor v. Cheatham*, 255 P.2d 173, 180 (Ariz. 1953). Even in these rural areas, however, landowners merely have a right to the usufruct of the nonappropriable groundwater. *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1328 (Ariz. 1981). The water itself is a state resource and the

right to use it is subject to state regulation. A.R.S. § 45-141; *Cherry*, 543 F. Supp. at 1275.

Reasonable use does not equate to excessive use. Arizona has studied water use outside AMAs and found that in such "reasonable use" areas the scarcity of water, concern for sustainability, and the cost of developing water are more significant limitations on use than a comprehensive regulatory scheme. One study shows that per-household domestic use was .5 acre-feet per year, below the standards set in many AMAs. Arizona Dep't Water Resources, *Technical Report on De Minimis Adjudication of Domestic Stock Pond and Other Stockwatering Uses in San Pedro River Watershed* (1993), at Appendix A-3. If more comprehensive regulation is needed to address changing circumstances, the State can regulate water use administratively or through legislation tailored to fit the changed circumstances.

Arizona already has achieved significant reductions in groundwater diversions. Total annual groundwater diversions in the four AMAs have declined from 3,166,000 acre-feet per annum during the period from 1971-1975 to 1,760,000 acre-feet per annum during the period from 1986-1990. *Assessment, Vol. I*, p. 70. The State also has taken very significant actions to enhance water supplies.[15]

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[15] Such measures include the construction of the Central Arizona Project ("CAP"), *Assessment Vol. I* at 55-56; *see generally Central Arizona Water Conservation Dist. v. United States*, 32 F. Supp. 2d 1117, 1122-23 (D. Ariz. 1998). They also include establishment of the Arizona Water Banking Authority to store Colorado River water in the state's central aquifers, *see* Bonnie

Arizona's Groundwater Code mandates safe-yield or sustainability in active management areas, limits new irrigation, and allows reasonable use in remote, rural areas until a need develops for more active management of the groundwater supplies. By protecting the common supply of groundwater Arizona law protects the interests of federal reservations in such water.

II. The Proceedings Below.

The decision below is the latest in a series of opinions arising from the Gila River General Stream Adjudication, in which the Arizona Supreme Court has established certain ground rules for Arizona's general stream adjudications.[16] *See Gila River III*, 989 P.2d 739; *In re the Gen.*

G. Colby, et al., *Economics of Water Scarcity, in Ensuring Arizona's Water Quantity and Quality Into the 21st Century* 108 (1997); A.R.S. §§ 45-2401 to -2472; the "Recharge Program," which allows entities with surplus renewable water supplies to store that water in underground aquifers, *see* A.R.S. §§ 45-801.01 to -891.01; *Water in the West*, p. 3-10; *The Geography of Water Availability* at 93; and regulatory programs to encourage effluent use as part of the AMA management plans. *Id.* at 94.

[16] In Arizona a "general stream adjudication" is "an action for the judicial determination or establishment of the extent and priority of the rights of all persons to use water in any river system and source." A.R.S. § 45-251(2). The statute defines a "river system and source" to be "all water appropriable under § 45-141 and all water subject to claims based upon federal law." A.R.S. § 45-251(7). Arizona's general stream adjudications therefore encompass two types of water: waters that are "appropriable" and waters that are "subject to claims based upon federal law." The United States and several Indian tribes were joined as parties to the adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666.

Adjudication of All Rights to Use Water in the Gila River Sys. and Source, 857 P.2d 1236 (Ariz. 1993) ("*Gila River II*"); *In the Matter of the Rights to the Use of the Gila River*, 830 P.2d 442 (Ariz. 1992) ("*Gila River I*").

Due to the unparalleled size and scope of the case, *see Gila River I*, 830 P.2d at 446, the trial court understandably was reluctant to spend decades adjudicating tens of thousands of individual claims according to the wrong legal standards. Accordingly, the trial judge identified eight legal issues to be resolved before individual claims were adjudicated, and decided those issues after hearings and briefings which focused on the connection between groundwater and surface water. App. D2-D3. The trial court ruled, among other things, that "federal reserved water rights apply to both surface water and groundwater sources on and off the reservation whose diversion affects reservation sources, to the extent that there is not enough water left to satisfy the reservation's purpose, or P.I.A. [Practically Irrigable Acreage] if the land is an Indian reservation." App. D23. The trial court did not consider or discuss evidence of the purposes and needs of any specific federal reservation. App. D16-D23.

The Arizona Supreme Court granted review of the trial court's ruling on federal reserved water rights as two of six issues that it "reformulated" in an order granting interlocutory review. See Orders Concerning Petitions for Interlocutory Review, App. B.[17] In the decision below,

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[17] Interlocutory review was granted pursuant to a special procedural order that provided for expedited appellate review of trial court decisions of important legal issues in the case. The procedural order is reproduced as Appendix A to the *Gila River I* decision, and at App. C.

the court began with the proposition that a reserved right to water will be implied where the purpose of a federal reservation of land would otherwise be defeated, citing *Winters v. United States*, 207 U.S. 564 (1908), and *Arizona v. California*, 373 U.S. 546 (1963). The court expressed concern that "some reservations lack perennial streams," and thus their purpose could be frustrated without access to groundwater. *Gila River III*, 989 P.2d at 746. On the basis of *Cappaert v. United States*, 426 U.S. 128 (1976), the Arizona Supreme Court reasoned that this Court would not differentiate between surface and groundwater when identifying the source of a federal reserved right. *Gila River III*, 989 P.2d at 746. Finally, the court concluded that it could not defer to state law on this issue, because the doctrine of reasonable use would allow impairment of federal access to groundwater, as indicated by the historic depletion of groundwater in the absence of other legal constraints. *Gila River III*, 989 P.2d at 748. The opinion was almost devoid of discussion of the Groundwater Code, although a number of federal reservations border AMAs and therefore benefit from the statutory restrictions on groundwater use.[18] The Arizona Supreme Court held that "[f]ederal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation." *Gila River III*, 989 P.2d at

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[18] For example, the Gila River Indian Reservation is situated between the Phoenix and Pinal AMAs; the Tohono O'Odham Reservation borders the Tucson and Santa Cruz AMAs, and the Yavapai Prescott reservation borders the Prescott AMA. *Assessment, Vol. I*, at 68, 84; App. I.

751. In effect, the court equated need for water with need for a reserved right.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. The Decision Below Is Inconsistent With Decisions of this Court and of the Supreme Court of Wyoming.

This Court should grant certiorari to correct the Arizona Supreme Court's misapplication of prior decisions of this Court, and to resolve the conflict between the decision of the Arizona Supreme Court in *Gila River III* and the decision of the Wyoming Supreme Court in *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 753 P.2d 76 (Wyo. 1988) ("*Big Horn*"), which properly reached the opposite conclusion. 753 P.2d at 99-100.

Gila River III is an unwarranted extension of this Court's precedents regarding federal reserved rights to water. This Court has previously implied reserved water rights on a case-by-case basis only where absolutely necessary to prevent the frustration of the purpose of a particular federal reservation under state law schemes that allocated water based upon priority of use. *See United States v. New Mexico*, 438 U.S. 696, 700 (1978). Such rights are implied only after careful review of the underlying legal instruments by which the particular reservation was created. *See Winters*, 207 U.S. at 575-76 (existence of federally reserved rights "turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation."). Moreover, this Court has never applied the *Winters* doctrine to groundwater; in fact, it has

carefully refrained from doing so. *See Cappaert*, 426 U.S. at 138, 142.

Notwithstanding this Court's restrained and careful approach to implied reserved rights, the Arizona Supreme Court concluded that a reserved right to groundwater should be implied based upon *Cappaert*, 426 U.S. at 138. *Gila River III*, 989 P.2d at 745. Although the existence of water available for appropriation was essential to the *Cappaert* analysis, the court ignored language in *Cappaert* referring to the reservation of *unappropriated* water, which strongly suggests that the *Winters* doctrine should only be applied where water is allocated under the doctrine of prior appropriation. *Cappaert*, 426 U.S. at 139. The Arizona Supreme Court inexplicably did not analyze the issue of whether groundwater that is *not appropriable* under state law is *available for appropriation* and therefore subject to the federal reserved rights doctrine.

Arizona adopted a bifurcated system of water rights. Surface water and a narrowly defined subflow zone that is directly associated with the stream are subject to the doctrine of prior appropriation. Percolating groundwater, *i.e.*, underground water that is not directly associated with a stream, cannot be appropriated under Arizona law. *Bristor*, 255 P.2d at 177. Instead, it is considered a common supply that is equally available to the owners of overlying lands, for use on those lands, limited by the common law doctrine of reasonable use and state statutory law. *Gila River II*, 857 P.2d 1236, 1240; *Town of Chino Valley*, 638 P.2d at 1328. Arizona's bifurcated system reflects its deliberate policy choice to encourage decentralized development of a limited water supply and to

discourage the monopolization of control over water. *Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 4 P.2d 369, 373 (Ariz. 1931).

Instead of concluding that there can be no federal reserved right to groundwater in Arizona because groundwater is not available for appropriation, the Arizona Supreme Court in *Gila River III* found that all groundwater in the State is "unappropriated and thus available" to be reserved for federal use. Such a rule gives federal interests an unintended priority over all other groundwater users, based on a legal doctrine that is predicated on a need – the need to reserve water essential for federal purposes from prior appropriation by non-federal entities – that does not exist where groundwater is not subject to prior appropriation under state law. Significant inequities, uncertainties, inter-governmental conflicts, and interference with the State's management of a shared public resource is likely to result. This Court should grant certiorari to clarify that the federal reserved-right-to-water doctrine does not apply to groundwater that is not appropriable under state law.

II. The Decision Below Unnecessarily Displaces State Law and Impairs State Management of Groundwater Resources, Contrary to Established Federal Policies of Deference to State Water Law.

In holding that federal reserved rights extend to groundwater and therefore take priority over other uses, the Arizona Supreme Court unnecessarily displaced state law and impaired the State's ability to manage its groundwater resources. The Court should grant certiorari

to clarify that federal law does not displace state water law unless the application of state law would frustrate federal purposes, because water management is best accomplished through state law that can be tailored to local needs. As the Water Policy Review Advisory Commission[19] stated in its 1998 report:

> Achieving sustainable groundwater use is one of the major water management challenges facing the West. This is primarily a state rather than a federal responsibility. Even though it is widely understood that ground- and surface-water resources are interrelated, most states continue to manage ground and surface water by different legal regimes. The majority of western states administer surface waters under the doctrine of prior appropriation or by a mixed appropriative-riparian system. However, groundwater governance regimes display less uniformity and are typically far less well defined, making it more difficult for states to manage limited supplies.

Water in the West, p. 3-6.

Arizona is one of several states that apply prior appropriation principles only to surface water and a narrowly defined subflow zone that is directly associated

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[19] The Commission was appointed pursuant to a 1992 act of Congress to assist the President in fulfilling his responsibility to make findings and recommendations to Congress regarding federal activities in Western states that directly or indirectly affect the allocation and use of water resources. *Water in the West* at 1-2 to 1-5.

with the stream.[20] Over more than 100 years, Congress has deliberately allowed for the development and application of state water law, even on public lands. *See generally California v. United States*, 438 U.S. 645, 653-70 (1978). Congress purposefully deferred to state law in matters of water rights because, as then Representative Sutherland stated, "if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail" and "[d]ifferent water rights in the same State would be governed by different laws and would frequently conflict." *Id.* at 667-68; *see also United States v. Anderson*, 736 F.2d 1358, 1365 (9th Cir. 1984). Such deference to state law is appropriate even where federal rights are at issue, so long as the federal purpose is not frustrated or impaired. *See United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979).

Although states must protect federal interests in groundwater, this Court has never declared that federal law requires application of prior appropriation principles to groundwater, or that federal interests must be absolutely protected against the effects of water shortage without regard to the needs of other water users. Instead of imposing an inflexible rule to guaranty absolute protection of federal water rights, Congress and this Court have allowed states the flexibility to choose the most

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[20] The other states are California, Hawaii, Texas, Nebraska and Oklahoma. Water Resources Research Center, University of Arizona, *How Western States Manage Interconnected Groundwater and Surface Water* 3 (1994); *City Mill Co. v. Honolulu Sewer & Water Comm'n*, 30 Haw. 912 (1929).

appropriate methods for allocation and conservation of water, so long as federal interests are fairly accomodated.

Arizona has chosen to accommodate state and federal interests by maintaining a non-appropriative system of groundwater management. The State has considered this system adequate to protect its considerable property interests including 9.4 million acres of trust lands, which the State holds as trustee for the benefit of schools and other institutions.[21] These trust lands are located in all parts of the State, are largely undeveloped, are intermingled with private lands and federal reservations, and share access to underground aquifers. App. I, J. Although Arizona has asserted claims for water in the nature of a reserved right,[22] to date it has not asserted priority over other groundwater users on the basis of this reserved right, in the belief that its ownership of the overlying land affords reasonable use of the shared aquifers. There

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[21] Sections 16 and 36 of every township were reserved for the future state of Arizona when the Territory of New Mexico was created. Act of Sept. 9, 1850, §§ 2, 15, 9 Stat. 446, 447, 452. The reservation of lands was confirmed when the Territory of Arizona was created. Act of Feb. 24, 1863, §§ 1-2; 12 Stat. 664, 665. Upon its admission to the United States, Arizona was granted sections 2, 16, 32, and 36 in every township, or lands in lieu thereof where the numbered sections were unavailable, and certain additional lands. Arizona-New Mexico Enabling Act, Act of June 20, 1910, 26 Stat. 557, 572 (1910). These lands are held in trust subject to restrictions imposed by the Enabling Act and the Arizona Constitution. *Lassen v. Arizona*, 385 U.S. 458, 460 n. 2 (1967); *Fain Land & Cattle Co. v. Hassell*, 790 P.2d 242, 244 (Ariz. 1990).

[22] Peter W. Sly, *Reserved Water Rights Settlement Manual* (1988) at 45-46.

exists no logical or legal basis for affording greater protection to underground water needed by newly created national monuments than to underground water needed for development of the State's trust lands, or by the millions of people who settled in Arizona and became dependent upon groundwater for a myriad of uses.

The *Gila River III* decision would result in a system in which only federal water users have a date of priority. This results because one attribute of a federal reserved right is priority for the entire right over persons who appropriate water after the date of the reservation. *Cappaert*, 426 U.S. at 138. It may be argued that because Arizona does not allocate groundwater based upon priority of initiation of use, application of the reserved-right-to-water doctrine to groundwater in Arizona would mean that when supplies are low even the most recent federal uses would continue unabated while even the most long-standing state-law based uses would bear the entire burden of shortages.[23] It also might be argued that the *Gila River III* decision would allow any federal user to drain the common aquifer for a low value use, such as pasture

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[23] The establishment of the Agua Fria National Monument by Presidential Proclamation on January 11, 2000, provides a good example of the potential problem caused by the *Gila River III* decision. Proclamation No. 7263, 65 Fed. Reg. 2817 (2000). The Proclamation reserves "subject to valid existing rights, a quantity of water sufficient to fulfill the purposes for which this monument is established." It is possible that federal representatives will assert that the *Gila River III* decision grants superior rights to groundwater to the Agua Fria National Monument, with a priority date of January 11, 2000, over groundwater pumping, lacking a priority date, that has historically occurred in the area under state law.

or irrigation, while local municipal wells in the same aquifer run dry. The decision also positions federal claimants to object to all off-reservation pumping, on the theory that every well interferes with superior federal reserved rights.[24]

These consequences could and should have been avoided, without jeopardizing federal water rights, by simply applying the non-discriminatory state law as the rule of decision, instead of creating a special federal rule. *See Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 671-72 (1979); *Kimbell Foods*, 440 U.S. at 728; Petition for Writ of *Certiorari* filed by Phelps Dodge Corporation, *et al.* at pp. 16-22.

III. This Court Should Settle the Important Question of Whether The Implied-Reservation-of-Water-Doctrine Extends to Groundwater to Reduce the Substantial Uncertainties Affecting Millions of Americans in Western States.

McCarran Amendment adjudications have been filed in Arizona and at least nine other states. Thomas H. Pacheco, *How Big is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 Ecology L.Q. 627, 635 n. 48 (1988). Because such proceedings must adjudicate

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[24] The United States and various Indian tribes in fact filed over 11,000 objections to wells listed in the San Pedro River Hydrographic Survey Report on the basis that pumping by those wells interferes with or is subject to federal reserved rights. See objections on file at the Arizona Department of Water Resources identified with Special Master's Uniform Objection Code Nos. 561, 562, and 1134.

the rights of all claimants to water from a particular river system, they involve numerous parties and attorneys, and are both unwieldy and time-consuming.[25] All participants in general stream adjudications need to know the ground rules that will determine their rights. This Court's grant of certiorari would settle an important, unresolved question of federal law and reduce the likelihood that legal error will infect pending general stream adjudications for decades to come.

Federal reserved rights claims create a great deal of uncertainty about the rights of other water users, due to the size and number of federal claims[26] and the fact that the rights are unquantified because they are not based on actual, historical use. *See generally Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 824-25 (1976) (Stewart, J., dissenting). Delayed quantification of

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[25] The Gila River adjudication involves tens of thousands of litigants and has been pending for over 25 years. The Big Horn adjudication in Wyoming involved more than 100 attorneys in the first six years of litigation, and produced transcripts in excess of 15,000 pages and more than 2300 exhibits. *See Big Horn*, 753 P.2d at 85.

[26] Nearly three-fourths of the land in Arizona is owned by the federal government. App. A14, I, J. Over 3.3 million acre-feet of water have been claimed for Arizona's 19 Indian reservations, and additional claims have been asserted for national forests, parks, monuments, and other federal enclaves. In *Arizona v. California*, Indian reservations located along the Colorado River were awarded approximately 900,000 annual acre-feet and other federal enclaves in Arizona, including the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge, and the Lake Mead National Recreation Area, Arizona were awarded over 79,000 acre-feet per year. *Arizona v. California*, 373 U.S. 546, 598-600 (1963).

federal and tribal water rights leads to an inequitable situation for Indians and creates uncertainty for all other water users.[27] Because federal rights inescapably vie with other public and private claims for the limited quantities of water, delay also increases the likelihood that established uses, developed at considerable cost, will be disrupted.[28] Uncertainty hampers the resolution of these competing claims. As the Western Water Policy Review Advisory Commission warned:

> [M]any states have undertaken McCarran Amendment adjudications. These adjudications have proved to be long and costly and have not yet produced the desired quantification of existing rights. *The more uncertain rights are, the more water right holders resist participation in conflict resolution processes because of concerns that claimed rights will be diminished.*

Water in the West, 2-39 (emphasis added).

This Court should grant review to reduce the uncertainty about the nature and extent of federal reserved rights, thereby facilitating the resolution of pending and future adjudications.

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[27] As of 1995, there were more than 60 court cases pending involving Native American water rights, potentially affecting the distribution of more than 60 million acre-feet of water. *Water in the West*, 2-28.

[28] Huge amounts of private capital have been invested in the development of water resources. *California v. United States*, 438 U.S. 645, 649 n. 3, 655 (1978); *Bristor*, 255 P.2d at 175.

CONCLUSION

For the foregoing reasons, and for the other reasons stated in the Petitions for Certiorari, the Court should grant the Petitions for Writs of Certiorari.

Respectfully submitted March 13, 2000.

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Nos. 99-1388 and 99-1389

IN THE

Supreme Court of the United States

PHELPS DODGE CORPORATION, *et al.*,
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Respondents.

On Petitions for Writ of Certiorari to the Supreme Court of the State of Arizona

BRIEF OF THE HOPI TRIBE, THE NAVAJO NATION AND THE SAN JUAN SOUTHERN PAIUTE TRIBE IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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INTRODUCTION

In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), the Court remanded this comprehensive stream adjudication to the Arizona courts for decision with twin admonitions: (1) "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law," *id.* at 571, and (2) "[b]ecause of their sovereign status, [Indian] tribes and their reservation lands are insulated in some respects by a

'historic immunity from state and local control.'" *Id.* (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983)). The Arizona courts have faithfully carried out this mandate. Thus, the Arizona Supreme Court determined, as a general principle of federal law, that tribal reserved water rights *may* include groundwater, depending upon the purposes for which each separate reservation was established and the availability of surface water supplies, both questions which had not yet been litigated. In so ruling, the Arizona court rejected application of the unique Arizona groundwater law which permits non-Indian pumpers without penalty to drain the aquifers under federal and tribal lands. Despite the interlocutory nature of the Arizona Supreme Court's decision, petitioners rush to seek this Court's review of a, to them, disappointing result from the state courts for whose jurisdiction they had previously argued so vigorously.

PARTIES TO THIS BRIEF IN OPPOSITION

Respondents, the Hopi Tribe, the Navajo Nation and the San Juan Southern Paiute Tribe (collectively the "Little Colorado River Tribes"), are parties, *inter alia*, to a general stream adjudication involving the watershed of the Little Colorado River. That litigation presents many of the same legal issues, including the question here presented in the petitions for a writ of certiorari, that have been raised in *In re the General Adjudication of All Rights to Use Water in the Gila River System*. *See* Appendix to Petitions for Writ of Certiorari A7 (hereinafter App.). Accordingly, the Arizona Supreme Court permitted the Little Colorado River Tribes to participate as interested parties in the proceedings below. *Id.* at A6. Indeed, the respondents have a particularized interest in the Arizona court's holding with respect to groundwater because, as pointed out more fully hereinafter, the Little Colorado Tribes' reservations are located on some of the most arid lands in the United States and, for the most part, lack a reliable supply of surface water.

A. *The Navajo Nation*: The Navajo Indian Reservation occupies an area covering approximately 25,000 square miles, or 15,432,170 acres, in Arizona, New Mexico and Utah, and was home to a population of approximately 219,200 as of 1990. DAVID H. GETCHES *ET AL.*, FEDERAL INDIAN LAW, CASES AND MATERIALS 9-13 (3d ed. 1993). As originally established by the Treaty of June 1, 1868, 15 Stat. 667, the reservation did not encompass all of the lands then occupied by the Navajo Nation. Hollis A. Whitson, *A Policy Review of the Federal Government's Relocation of Navajo Indians Under P.L. 93-531 and P.L. 96-305*, 27 ARIZ. L. REV. 371, 375 (1985). The inadequacy of the 1868 Reservation was especially marked in the Little Colorado River basin in Arizona. Since 1868, the President by executive order—later ratified by Congress—expanded the reservation. *E.g.*, 25 U.S.C. § 398d; Exterior Boundaries of Navajo Reservation in Arizona, C. 521, 48 Stat. 960 (1934). Much of the Navajo Indian Reservation is wholly dependent upon groundwater for drinking water, stock raising and agriculture. Other portions are dependent upon surface water that could be depleted by off-reservation groundwater pumping.

B. *The Hopi Tribe*: Since long before Spanish explorers arrived in the Southwest, the Hopi Tribe has been dependent upon groundwater for drinking water, religious uses and gardens. The Hopi people have located their villages in order to have access to springs, which are sacred to them. Because there are no perennial streams on the Hopi Reservation, every Hopi village depends upon groundwater for drinking water, stock ponds and agriculture. The majority of irrigated acreage on the Hopi Reservation is watered from springs, or spring-fed ephemeral stretches of otherwise dry washes. Groundwater is essential to the survival of the Hopi people on the reservation set aside as their permanent homeland. *See* Treaty of Guadalupe Hidalgo, February 2, 1848, U.S.- Mex., arts. VIII, IX, 9 Stat. 922; Executive Order of December 16, 1882.

C. *The San Juan Southern Paiute Tribe*: The San Juan Southern Paiute Tribe has historically occupied lands in the Little Colorado River basin.[1] In the area occupied by the Tribe, except for one minor wash that runs briefly only in the wettest years, the only source of available water is groundwater. Through springs and wells, the Tribe uses groundwater for its domestic and agricultural needs. Given the location of its homeland, its claims are solely to groundwater. The Tribe's future survival on its arid lands can be assured only if the Tribe's right to groundwater is recognized.

STATEMENT OF THE CASE

A. *The Little Colorado River Adjudication*: The Little Colorado River basin encompasses an area of 26,964 square miles in northeast Arizona and northwest New Mexico. Indian lands occupied by five Indian tribes, including the Little Colorado River Tribes, account for approximately 11,000 square miles of the approximately 21,700 square miles in the basin in Arizona.

The Little Colorado River stream adjudication began in 1978 with the filing by the Phelps Dodge Corporation of a petition with the Arizona State Land Department to determine conflicting water rights in that basin. Today there are approximately 3,100 claimants in the Little Colorado River adjudication who have filed nearly 11,000 statements of claims. The major claimants, in addition to the Little Colorado River Tribes, include non-Indian communities (such as Show Low, Snowflake, Springerville, St. John, Holbrook, Winslow, and Flagstaff), large industrial users (such as Arizona Public Service, Phelps Dodge Corporation, Salt River Project, and Tucson Power & Electric), irrigation

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[1] Although the Tribe does not presently have a formal reservation, the court in *Masayesva v. Zah*, 794 F. Supp. 899 (D. Ariz. 1992), determined that the Tribe has a joint interest with the Navajo Nation in approximately 26,000 acres of land, and an exclusive interest in a smaller area, all northwest of Tuba City on the Navajo Indian Reservation.

companies (such as St. Johns, Silver Creek and Show Low Irrigation Companies), and the United States. The rights of all these parties are closely intertwined.

> [B]y reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings.

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 811 (1976) (quoting S. Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951)). "This concern is heightened with respect to water rights, the relationships among which are highly interdependent." *Id.* at 819.

Although the Little Colorado River adjudication started over twenty years ago, the respective rights of the parties to water have not yet been determined, nor have most of the underlying legal and factual questions ever been litigated. This delay is due in part to an early dispute over the appropriate court to try the case,[2] in part to changes in the order the claims were to be heard,[3] and in part to stays during the course of protracted (and still on-going) settlement discus-

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[2] The Navajo Nation filed an action seeking, ultimately unsuccessfully, to have its water rights in the Little Colorado River basin adjudicated in federal court. *Navajo Nation v. United States*, 668 F.2d 1100 (9th Cir. 1982), *rev'd sub nom. Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). Thereafter, the United States and the Navajo Nation sought, again unsuccessfully, to dismiss the state court adjudication. *United States v. Superior Court*, 697 P.2d 658, 671-73 (Ariz. 1985).

[3] By a pre-trial order dated April 24, 1987, the Superior Court directed that first consideration be given to water rights in three sub-basins of the Little Colorado River, which mainly involved the claims of non-Indians under state law. By order dated January 27, 1994, the court modified its approach to the litigation by directing the parties to turn their attention to the tribal claims.

sions.[4] The Little Colorado River Tribes have also participated actively at the trial court level and before the Arizona Supreme Court in briefing and oral argument during both the interlocutory consideration of certain significant legal questions and the prosecution of two Special Actions arising in related litigation, *In re the General Adjudication of All Rights to Use Water in the Gila River*. App. A7-A9.

B. *The Proceedings Below*: Like the Little Colorado River adjudication, the Gila River adjudication is still in its infancy. In December 1990, addressing an interlocutory appeal by various parties to the Gila River proceedings, the Arizona Supreme Court identified six issues that it would address on an interlocutory basis. *See* App. B. Two of those issues—whether groundwater, in the absence of available surface water, may be considered to satisfy federal reserved rights under the doctrine first announced in *Winters v. United States*, 207 U.S. 564 (1908), and whether federal rights to groundwater are entitled to protections which differ from those provided under state law—were the subject of the Arizona Supreme Court's decision below. The Arizona court answered both questions in the affirmative, although petitioners seek review here only of the decision on the first question.

In addressing the applicability of the reserved rights doctrine to groundwater, the Arizona court first noted that the task in water rights adjudication is to examine the conflicting claims to water under state and federal law, stating "[a]n adjudication such as this cannot achieve its comprehensive purpose without quantifying and prioritizing federal, as well as state law, claims." App. A13; *accord Arizona v. San*

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[4] As petitioners have pointed out, "there have been four settlements approved by the Gila Adjudication court that resolve some or all of the claims of specific Indian tribes within the basin." Phelps Dodge Pet. at 5 n.2. *See also* Southern Arizona Water Rights Settlement Act of 1982, Pub. L. No. 97-293, 96 Stat.1261, 1274 (Papago Tribe).

Carlos Apache Tribe, 463 U.S. 545, 552, 570 (1983). Quoting this Court's decision in *San Carlos Apache Tribe*, the court noted that it must apply "federal substantive law to measure federal rights in [this] state adjudication." App. A15. In defining the scope of the reserved rights doctrine, the court also quoted from *Cappaert v. United States*, 426 U.S. 128, 138 (1976), to establish, among other principles, that water is reserved "to the extent needed to accomplish the purpose of the reservation." App. A15.

Turning to the question of whether groundwater at least theoretically could be reserved, the Arizona Supreme Court carefully considered whether, under existing precedent, groundwater could be counted among the resources available to satisfy federal reserved rights to water. Relying on *Winters*, 207 U.S. at 569, and *Arizona v. California*, 373 U.S. 546, 599 (1963), the Arizona court held:

> The reservations in those cases depended for their water upon perennial streams. But some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life.

App. A19.

The Arizona court bolstered its holding that groundwater may be included to satisfy federal reserved water rights by looking to this Court's holding in *Cappaert*. There, the Court recognized surface water and groundwater as "integral parts of the hydrologic cycle." App. A19 (quoting *Cappaert*, 426 U.S. at 142). Because of such integration, there is no difference between "surface and groundwater when identifying the water to be protected." App. A20. According to the court, "[t]he significant question for the purpose of the

reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation." *Id.*

Finally, the court stated that it was deciding the issue "in the abstract" and that it was not holding "that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." App. A24. The court further explained that "[t]o determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." *Id.* (citing *United States v. New Mexico*, 438 U.S. 696, 700 (1978)). Finally, the court admonished that "[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." App. A24.

The present petitions followed.

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE ARIZONA SUPREME COURT IS NOT A FINAL JUDGMENT OR DECREE AND THUS IS NOT SUBJECT TO REVIEW UNDER 28 U.S.C. § 1257(a).

A. Petitioners admit the ruling below is interlocutory.

The Arizona Supreme Court has concluded, as a matter of federal law, that the reserved water rights of Indian tribes, recognized and protected by this Court in *Winters v. United States*, 207 U.S. 564 (1908), and *Arizona v. California*, 373 U.S. 546 (1963), may include underground water as well as surface water depending upon the facts and circumstances surrounding the establishment of each reservation. The court below heard this issue on appeal pursuant to a 1989 Special Procedural Order Providing for Interlocutory Appeals and Certification and at an early stage of proceedings before the

trial court. *See* App. C. Among other outstanding questions, the trial court has yet to determine, as it eventually must, the nature and extent of the reserved water rights for each Indian reservation and, also on a case-by-case basis, whether groundwater actually was intended and is needed to satisfy those particular rights.

Under 28 U.S.C. § 1257(a), the Court may review only "[f]inal judgments or decrees rendered by the highest court of a State." The Arizona Supreme Court's ruling in this case plainly was "interlocutory," and is so conceded by the petitioners in No. 99-1388.[5] Phelps Dodge Pet. at 9. The Court, therefore, does not have jurisdiction to entertain the petitions unless the otherwise interlocutory holding of the court below somehow fits within the limited category of cases where section 1257(a) finality has been found even though further proceedings in the lower courts are contemplated. *See, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 178-79 (1988). *But see Flynt v. Ohio*, 451 U.S. 619, 622 (1981) (review in the absence of a final judgment without any adverse effect upon important federal interests would permit the "exception to swallow the rule"). The finality rule with respect to review of state court proceedings is, of course, based upon sound principles of federalism. *See, e.g., North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156, 159 (1973) (the finality rule "limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs"); ROBERT L. STERN, *ET AL.*, *SUPREME COURT PRACTICE* 95 (7th Ed. 1993). As is next demonstrated, the decision of the Arizona Supreme Court abjectly fails the finality test.

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[5] The Salt River Project petitioners in No. 99-1389 do not discuss the jurisdiction of the Court.

B. The exceptions to the final judgment rule set forth in *Cox Broadcasting* are not applicable where significant federal questions remain unanswered.

In *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), the Court set forth four categories of cases involving 28 U.S.C. § 1257(a) or its predecessors where, in a departure from the "requirement of finality," this Court has reviewed interlocutory decisions "without awaiting the completion of the additional proceedings anticipated in the lower state courts." 420 U.S. at 477. The Court further pointed out, however, that "[i]n most, if not all, of the cases in these categories, these additional [state court] *proceedings would not require the decision of other federal questions* that might also require review by the Court at a later date." *Id.* (emphasis added) (footnote omitted); *accord Flynt v. Ohio*, 451 U.S. at 621. The comprehensive water rights adjudication proceedings from which the decision below arises still involve fundamental and decisive unresolved questions of federal law, such as the interpretation of federal treaties, statutes and executive orders to determine what water rights were intended to be reserved when various Indian reservations were established. These significant unresolved federal questions, standing alone, should preclude piecemeal review of an Arizona Supreme Court decision which deals with only part of the case. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 127 (1945) ("Of course, where the remaining litigation may raise other Federal questions that may later come here, . . . to allow review of an intermediate adjudication would offend the decisive objection to fragmentary reviews."); *North Dakota Pharmacy Bd.*, 414 U.S. at 159 (the finality rule "avoids piecemeal review by federal courts of state court decisions").

In any event, the decision below does not fit within any of the four exceptions to the final judgment rule described in

Cox Broadcasting. The first category, for example, covers cases where "the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S. at 479. Here in the proceedings below, virtually all the basic legal and factual issues have not yet been reached, much less conclusively decided.[6] In addition to the matters of treaty and statutory interpretation mentioned above, the Arizona Supreme Court has listed for future briefing and argument the following critical question of federal law independent of the groundwater issue: "What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?" App. A8; App. B2. In short, the ultimate result below hardly can be classed as preordained or free of other federal issues. *Minnick v. California Dep't of Corrections*, 452 U.S. 105, 120 (1981).

The second *Cox Broadcasting* category includes cases in which the federal issue "will survive and require decision regardless of the outcome of further state court proceedings." 420 U.S. at 480 (citing *Radio Station WOW* and *Brady v. Maryland*, 373 U.S. 83 (1963)). The cases cited by the Court in *Cox Broadcasting* as falling into this category all are distinguishable since, unlike this case, none involved outstanding federal issues in addition to the question actually decided by the highest court of the State.[7] Moreover, whether

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[6] In a filing before the Superior Court in the Little Colorado River adjudication (attached as Exhibit A), the State of Arizona, in requesting a pretrial conference, declared as recently as April 17, 2000: "The State of Arizona agrees [with Phelps Dodge and others] that the litigation of tribal claims and objections to tribal claims will require this Court to address complex legal and factual issues." Exhibit A at 1.

[7] In addition to *Radio Station WOW* and *Brady*, the Court in *Cox Broadcasting* relied upon *Carondelet Canal & Nav. Co. v. Louisiana*, 233 U.S. 362 (1914), and *Forgay v. Conrad*, 6 (How.) U.S. 201 (1848). As is pointed out in *Radio Station WOW*, "the rationale of those cases is that a judgment directing immediate delivery of physical property is reviewable

the issue decided by the Arizona Supreme Court will survive and need to be decided by this Court is directly related to the outcome of further state court proceedings—a result which is currently unknown and unknowable. That outcome will depend upon: (1) whether the state courts construe the treaties, statutes or executive orders establishing a particular Indian reservation as having reserved groundwater; and (2) if so, whether any particular third party, including petitioners, is hurt by recognition of such reserved water rights. After all, as petitioners so frequently point out, Phelps Dodge Pet. at 24; Salt River Pet. at 5-6, 22, an earlier user of groundwater has no cause of action or other claim under Arizona law against a subsequent user, including an Indian tribe, who makes "reasonable and beneficial" use of the water underneath his or her own lands.[8] ARIZ. REV. STAT. § 45-453. In other words, the one federal issue among many decided, or to be decided, by the Arizona Supreme Court, on which petitioners seek review, may not survive further lower court proceedings and thus may never need to be decided by this Court.

The third *Cox Broadcasting* exception covers cases "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had,

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and is to be deemed dissociated from a provision for an accounting," 326 U.S. at 126, circumstances that do not exist in the instant case.

[8] Petitioners potentially could be adversely affected if their use of groundwater were curtailed to protect reserved water rights—a principle of federal law which the Arizona Supreme Court also recognized. App. A25-A28 (Question 5). Petitioners, however, have declined to seek review of that portion of the Arizona court's holding, Phelps Dodge Pet. at 9 n.4; Salt River Pet. at 9 n.7, perhaps in view of this Court's ruling in *Cappaert v. United States*, 426 U.S. 128 (1976) (pumping of underground water may be enjoined to protect prior federal reserved rights to surface water).

whatever the ultimate outcome of the case." 420 U.S. at 481. In the cases cited by the Court as examples of this category,[9] review after further lower court proceedings would have been precluded because, if the petitioner won below, the federal issue might become moot or the matter be decided on state law grounds, and if the petitioner again lost, any appeal would be barred for reasons of state law. *Id.* That is not this case. We are not aware of any state law, rule or other circumstance, and petitioners cite none, which would prevent them, if adversely affected, from preserving the federal issue decided by the Arizona Supreme Court for review by this Court after a final decree is entered. As the Court pointed out in *Colorado River Water Cons. Dist. v. United States*, 424 U.S. 800 (1976),

> questions [arising from the collision of private rights and reserved rights of the United States], including the volume and scope of particular reserved rights, are *federal questions* which, if preserved, can be reviewed [by the Supreme Court] *after final judgment* by the Colorado court.

Id. at 813 (quoting *United States v. District Court for Eagle County*, 401 U.S. 520, 526 (1971)) (emphasis added).

The fourth category of interlocutory decisions treated as final, according to *Cox Broadcasting*, and the sole exception upon which petitioners rely, Phelps Dodge Pet. at 10-11, consists of cases (1) where "the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issues by the Court" and (2) "where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* at 482-83. This case does not meet either of these conditions. Since the critical issues

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[9] *California v. Stewart*, 384 U.S. 436 (1966); *North Dakota Pharmacy Bd. v. Snyder's Stores*, 414 U.S. 156 (1973).

here *sub judice*—the nature of federal reserved water rights and the intent expressed in the government documents reserving such water rights—are all exclusively federal questions, petitioners cannot possibly prevail on non-federal grounds. Similarly, since the underlying cause of action involves, *inter alia*, the extent of federal reserved water rights, of which groundwater is only a part, a decision by this Court on the question presented for review cannot possibly preclude further litigation.

In order to justify exercise of this Court's jurisdiction, petitioners rip from context the Court's words in *Cox Broadcasting* that review may be granted "if a refusal immediately to review the state court decision might seriously erode federal policy." Phelps Dodge Pet. at 10 (citing 420 U.S. at 483). Petitioners carefully omit the Court's preceding statement—that the alleged erosion of federal policy comes into consideration *only* if the above-described two conditions are met, *i.e.*, only "[i]n these circumstances" may review be granted. 420 U.S. at 483. As demonstrated above, particularly given the continued existence of unresolved federal questions, the predicate "circumstances" do not exist in this case, so the matter of federal policy should never be reached.

Even assuming, *arguendo*, that federal policy implications might be relevant to an analysis of finality, petitioners still fail to show any federal policy that is placed in jeopardy by the decision below. Indeed, what really troubles petitioners is that the Arizona courts have upheld federal policy. Specifically, the Arizona Supreme Court's holding, rather than eroding federal policy, in fact protects from erosion the federal reserved water rights doctrine set forth by this Court in *Winters* and *Cappaert*.[10] In addition, petitioners' argu-

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[10] As the Court observed in *Flynt v. Ohio*:

> The cases which the Cox opinion listed as falling in the fourth category involved identifiable federal statutory or constitutional

ment that "state law . . . should be adopted as the rule of decision for determining rights under federal law," Phelps Dodge Pet. at 11, repeatedly has been rejected by this Court in federal reserved water rights cases. *See Winters*, 207 U.S. at 577-78; *Cappaert*, 426 U.S. at 145-46; *Arizona v. California*, 373 U.S. at 597-602; *see also United States v. New Mexico*, 438 U.S. 696, 715 (1978) ("the 'reserved rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas"); *Arizona v. San Carlos Apache Tribe*, 463 U.S. at 571 (state courts must apply federal substantive law to measure federal rights in state water rights adjudication). Stated quite simply, the applicable federal policies are not what petitioners say they are, and none is eroded by the decision below.

The fact that the Court has reviewed decisions of state supreme courts in federal reserved water rights litigation under other circumstances is irrelevant. Of the two cases cited by petitioners, Phelps Dodge Pet. at 13, the Court in *United States v. New Mexico*, had under review a final judgment defining the water rights of a specific federal reservation, 438 U.S. at 698, and in *Wyoming v. United States*, 492 U.S. 406 (1989), a case where no opinion was rendered, the Court had under consideration a decision where all the federal issues, including quantification of the Tribes' water rights, had been tried and determined. *See In re the General Stream Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 85 (Wyo. 1988). These cases and, presumably, any similar water rights decisions thus involved final judgments or decrees or fell within one of the *Cox Broadcasting* exceptions. The decision below does not.

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policies which would have been undermined by the continuation of the litigation in the state courts.

451 U.S. at 622.

II THE DECISION OF THE ARIZONA SUPREME COURT IS CONSISTENT WITH PRIOR HOLDINGS OF THIS COURT AND THUS REQUIRES NO REVIEW.

A. The court below correctly determined that the nature and extent of reserved water rights, including rights to groundwater, depend upon the purposes for which each federal reservation was created.

This Court repeatedly has ruled that the scope of federal reserved water rights depends upon the intent of the parties when each specific reservation was established. *Winters v. United States*, 207 U.S. at 575 ("The case, as we view it, turns on the agreement of May, 1888 [25 Stat. 113], resulting in the creation of the Fort Belknap Reservation."); *Arizona v. California*, 373 U.S. at 597 ("under our view, the Indian claims here [to water] are governed by the statutes and Executive Orders creating the reservations"); *Cappaert v. United States*, 426 U.S. at 139 ("In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water."). In short, the nature and extent of federal reserved water rights cannot be ascertained without first knowing the purpose for which the reservation was created.

The decision of the Arizona Supreme Court in this case is wholly consistent with the above-cited holdings of the Court. Thus, the court below concluded that, in federal reserved water rights cases, the trial court must determine the purpose of the reservation and then determine the waters necessary to accomplish that purpose—both "fact-intensive inquiries that must be made on a reservation-by-reservation basis." App. A24 (citing *United States v. New Mexico*, 438 U.S. at 700). Given the complete absence of trial court findings or any factual record on the subject, Phelps Dodge Pet. at 14, the

Arizona Supreme Court refused to decide that any particular reservation has a reserved right to groundwater. Rather the court held only that a reservation *might have* such a right if the facts and circumstances under which it was created ultimately so indicate. App. A24. On this point the court below further declared that "[a] reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation," *id.*, *i.e.*, the Government may have intended to reserve groundwater because the purpose of the reservation would otherwise be frustrated There is nothing new in that analytic approach to application of the reserved water rights doctrine.

Petitioners assert as a basis for review, however, the proposition that the Arizona Supreme Court's decision that reserved waters may include groundwater is improper because it was rendered "in the abstract" and "without aid of a record establishing the purposes of any federal reservation." Phelps Dodge Pet. at 14. This argument is self-defeating. Petitioners, in seeking review at an interlocutory stage of the proceedings, are asking this Court to take exactly the same action for which they fault the Arizona court—in short, to rule that groundwater may *not* be included within a reserved water right, also without aid of a factual record establishing the purposes of any federal reservation or the water supplies available to the reservation. Petitioners would have the Court establish a *per se* rule negating federal rights to groundwater, regardless of the underlying facts.

On the contrary, as petitioners acknowledge, this Court has determined reserved water rights "only after careful review of the underlying legal instruments by which the reservation in question was created." Phelps Dodge Pet. at 14-15. That is exactly the inquiry the court below directed. App. A24. Petitioners' argument thus shows plainly that their request for review at this time not only is premature, but also conflicts

with the orderly determination of reserved water rights previously sanctioned by the Court.

B. The Arizona Supreme Court correctly decided that federal reserved water rights in Arizona as elsewhere must be determined in accordance with federal and not state law.

In *Winters v. United States*, the Court recognized and protected a reserved water right under federal law that was independent of and paramount to any water right acquired under state law after the federal reservation had been established. The Court repeatedly has ruled since that 1908 decision that the nature and extent of federal reserved water rights are governed by federal and not state law. *See, e.g., Cappaert v. United States*, 426 U.S. at 145 (the "determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation"); *United States v. New Mexico*, 438 U.S. at 715 ("the 'reserved water rights doctrine' is a doctrine built on implication and is an exception to Congress' explicit deference to state water law in other areas."). Indeed, in the direct judicial antecedent to the instant proceedings, the Court declared that in state water adjudications, "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." *Arizona v. San Carlos Apache Tribe*, 463 U.S. at 571.

The Arizona Supreme Court in this case has simply followed that unbroken line of decisions. App. A15. Petitioners seek to distinguish these past holdings, however, by claiming that the Court there refused to apply state laws regulating the appropriation of water, but the Arizona law regulating groundwater is different. Phelps Dodge Pet. at 16-17, 24-25; Salt River Pet. at 20. Instead of first in time, first in right, as under the appropriation laws, the Arizona groundwater statute is said to permit all landowners to use groundwater underlying their lands for any reasonable purpose regardless of priority in time of use. Phelps Dodge Pet. at 24. Since federal

agencies and Indian tribes can pump groundwater pursuant to state law, petitioners allege, the court below should have invoked state law to define the federal right.

In addition to conflicting with 92 years of contrary precedents in this Court expressly holding that federal and not state law governs reserved water rights,[11] petitioners' argument that state law would protect reserved rights is demonstrably untenable in its own context. Specifically, as the Arizona Supreme Court recognized, "[a] theoretically equal right to pump groundwater, in contrast to a *reserved* right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumpers," App. A23, emphasis in original, a situation that already has occurred in the Lower Gila River watershed. *Id.* at A23-24. Moreover, if state law governs federally protected uses of groundwater, the State of Arizona—which is not known for being friendly to federal and Indian tribal water rights[12]—could amend state groundwater law to include federal and Indian reservations within "active management areas" or "irrigation non-expansion areas," and thus prohibit new uses of groundwater regardless of the purposes for which such reservations were created and their actual water needs. *See* Phelps Dodge Pet. at 25; Salt River Pet. at 5, n.3; State of Arizona Response at 6-8; *cf. Cappaert v. United States*, 426 U.S. at 136-138 (off-

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[11] State laws in general do not apply to Indian lands or property. *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law."); *Rice v. Olson*, 324 U.S. 786, 789 (1945)("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.").

[12] In 1995, Arizona enacted legislation to enlarge water rights acquired under state law at the expense of federal and Indian water rights, substantial portions of which the Arizona Supreme Court declared unconstitutional. *San Carlos Apache Tribe v. Superior Ct.*, 972 P.2d 179 (Ariz. 1999).

reservation pumping curtailed to protect a reserved surface water right). In short, Arizona groundwater law protects most existing uses—almost all now by non-Indians—but allows for prohibiting or sharply limiting new uses. State of Arizona Response at 5-8. Application of such a regulatory regime clearly would frustrate the purposes for which currently underdeveloped Indian reservations were established in circumstances where surface water supplies are inadequate. Petitioners' rationale (*i.e.*, even-handedness) for asking the Court to give primacy to Arizona's groundwater statutes, therefore, cannot survive even the most cursory scrutiny.

As previously noted, *supra* at section II.A., whether recognition of federal reserved water rights will affect current groundwater users, and also whether that effect will differ from the impact upon owners of appropriated water rights under state law, simply cannot be determined by this Court or any other court at this early date in the litigation in the absence of a record. Such determinations remain to be made—at least initially in the trial court. Petitioners' argument that the court below erred by failing to "integrate the disparate federal and state-law rights," Phelps Dodge Pet. at 17, with respect to groundwater thus is clearly incorrect. Petitioners never explain (nor could they) how the lower courts could "integrate" state law rights and federal reserved water rights when the latter rights have not yet been identified. Petitioners' additional arguments about statewide water shortages and that "[g]roundwater is and will remain an important component of Arizona's mix of water resources," Salt River Pet. at 16, do demonstrate, on the other hand, the desirability if not the necessity of considering groundwater as part of any comprehensive adjudication of water rights in the arid Southwest. As the State of Arizona points out, "groundwater 'is the primary water supply in most areas of the State,' " State Response in Support of Petitions at 3, a condition surely true also for Indian reservations.

C. The cases cited by petitioners as supporting application of state law are inapposite.

Petitioners rely upon two cases, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), in support of their argument that the Arizona Supreme Court erred in failing to adopt state law as the measure of the applicable federal law. Phelps Dodge Pet. at 17-22; Salt River Pet. at 23. Neither case supports adopting state law to govern reserved water rights.

Kimbell Foods sets forth in a commercial context certain general principles as to when federal law questions should be decided on the basis of state law rules. 440 U.S. at 728-29. This Court, however, long ago decided that federal reserved water rights questions are an exception and are to be decided without regard to state law. *United States v. New Mexico*, 438 U.S. at 715; *see also Winters v. United States*, 207 U.S. at 577-78. Moreover, this case does not meet the *Kimbell Foods* test for applying state law on two counts: (1) federal reserved water rights "by their nature are and must be uniform in character throughout the Nation;" and (2) "application of state law would frustrate specific objectives of the federal" reservations. *Id.* at 728. Indeed, were the *Winters* doctrine otherwise, states would be free to enact ostensibly non-discriminatory legislation which actually is aimed at defeating federal and Indian tribal water rights, as Arizona already has attempted during the course of these proceedings. App. A9 (citing *San Carlos Apache Tribe v. Superior Ct.*, 972 P.2d 179 (Ariz. 1999) (holding retroactive changes in state water law unconstitutional in substantial part)); *see supra* at 19.

Wilson v. Omaha Indian Tribe is also not a reserved water rights case. There, in a title dispute involving an Indian reservation, the Court had under consideration whether state law relating to accretion/avulsion should be adopted as the

governing federal law. The land in question had moved from the west to the east side of the river and thus from Nebraska to Iowa, but the major federal concern over the boundary between these states already had been resolved by interstate compact. Under these unique circumstances, the Court found no need for a nationwide rule or that application of state law would adversely affect any major federal interest, particularly since "[o]n some occasions, Indian tribes may lose some land because of the application of a particular state rule of accretion and avulsion, but it is likely on other occasions that the tribe will stand to gain." 442 U.S. at 673. This case, on the other hand, is not so devoid of an adverse impact upon significant federal rights.[13] Plainly this Court cannot conclude in the absence of any record that application of state groundwater law principles would have a neutral, rather than unfavorable effect, on federal reserved rights on Indian reservations in Arizona.

III. THE DECISION BELOW HAS NO NATIONAL SIGNIFICANCE AND NO IMMEDIATE IMPACT EVEN IN ARIZONA.

A. Arizona's exclusion of groundwater from the law of prior appropriation is not generally the rule in other states.

Petitioners focus on Arizona's legal bifurcation of surface and groundwater under which reasonable use, rather than the doctrine of prior appropriation, governs the taking of groundwater. Phelps Dodge Pet. at 24-26; Salt River Pet. at 23-28. Under the current Arizona system, landowners may pump "percolating" groundwater on their lands limited only by the doctrine of reasonable use. In contrast to the prior

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[13] After *Wilson*, the Court rejected borrowing a state statute of limitations as federal law where that would foreclose a tribal claim to land because such action "would be inconsistent with federal policy." *Oneida County v. Oneida Indian Nation*, 470 U.S. at 241.

appropriation doctrine, no priority attaches to such uses under Arizona law and, unless the pumpers are located in an "active management" or "irrigation non-expansion" area subject to certain statutory restraints against new uses, they are free to pump water beneath their land regardless of the impact that pumping may have upon either surface or groundwater supplies used by other persons. Phelps Dodge Pet. at 24-25; Salt River Pet. at 5-6. Petitioners contend that because Arizona law does not generally inhibit the use of groundwater by a landowner, state law is sufficient to allow an Indian tribe in Arizona to use groundwater when that resource is needed to fulfill the purposes of its reservation. Phelps Dodge Pet. at 25; Salt River Pet. at 24. Petitioners, of course, do not discuss what the impact on reserved water rights might be if Arizona were to adopt a "non-discriminatory" amendment to its Groundwater Code to prohibit or drastically limit all new pumping of groundwater, which is what most Indian uses will be.

Petitioners' arguments for review of the Arizona Supreme Court's decision turn in large part on the hydrologically-erroneous provisions of Arizona law which declare that percolating groundwater is distinct from surface water. *See In re the General Adjudication of All Rights to Use Water in the Gila River System*, 857 P.2d 1236, 1243 (Ariz. 1993); App. A11 (describing the assumptions of Arizona groundwater law as an "artifice"). These arguments ignore the fact that, unlike Arizona, virtually all other western states do *not* exclude groundwater from the application of the prior appropriation doctrine because they do not make the same artificial distinction between surface and groundwater. Indeed, of the ten western states listed by petitioners as having substantial federal and tribal lands, only California refuses to apply the doctrine of prior appropriation to groundwater. Salt River Pet. at 13 n.10; *compare* State Response in Support of Petitions at 17 n.20. As a result, the supposed ready access to groundwater under Arizona law that

the petitioners tout as sufficient to meet the needs of the Tribes is simply not a part of the law in other western states. Given Arizona's unique groundwater rules, this case has no national significance.

The difficulties petitioners claim may confront the adjudication court in integrating the right to use groundwater under federal law with the uncurtailed pumping of groundwater allowed under Arizona law are equally insubstantial. No doubt, as the state court recognized, that task will require thoughtful consideration by the parties and the courts. App. A28-29. But such problems are hardly insurmountable. Whatever doctrine or doctrines apply to the use of groundwater, the integration of state and federal rights inevitably will closely parallel the similar efforts that must be undertaken with regard to surface water—a task which this Court has found the state courts fully competent to handle. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. at 570. In any event, the rights can only be "integrated" after they have been determined, a task that remains to be done.

To summarize, petitioners' challenge to the decision below rests in significant part on the unique provisions of Arizona groundwater law which allow uninhibited pumping of the resource outside of statutorily restricted areas, but which stand apart from the law of virtually all other western states. Thus, neither the so-called advantage of Arizona law that enables Indian tribes to pump water on their reservations regardless of the extent of pre-existing demand on the underlying aquifer nor any difficulties that may arise in melding federal rights with otherwise unregulated pumping are present in those other states. Accordingly, the interlocutory decision of the Arizona Supreme Court is a poor vehicle for this Court to determine whether the purposes of the Indian reservations in question require the use of groundwater as well as surface water.

B. A ruling by this Court will not eliminate groundwater users from the litigation.

In an effort to inflate the importance of the question presented, petitioners argue that, absent this Court's overruling the Arizona Supreme Court, "thousands of claimants in the Gila River Adjudication will be forced to endure long and complex litigation." Phelps Dodge Pet. at 12 (internal quotation omitted). This plea is misguided. Assuming, *arguendo*, that the decision below were reversed, the same thousands of claimants, presumably groundwater users, still would have to remain in the litigation because their pumping might have to be curtailed to protect the federal reserved surface water rights that are decreed. *Cappaert v. United States*, 426 U.S. 128 (1976), plainly holds that surface water rights reserved under federal law are entitled to protection against groundwater pumpers exercising after-acquired rights pursuant to state law. Unfortunately, the very concept of a comprehensive stream adjudication, virtually by definition, inexorably requires hundreds or thousands of parties to participate, and this litigation will be long and complex with or without consideration of groundwater to satisfy federal reserved rights.

IV. THE DECISION BELOW DOES NOT CONFLICT WITH THE WYOMING SUPREME COURT'S DECISION IN *BIG HORN*.

Petitioners assert that the Arizona Supreme Court's decision in this case conflicts with the decision of the Wyoming Supreme Court in *In re the General Stream Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *aff'd without opinion by an equally divided court*, 492 U.S. 406 (1989). Petitioners' claim of conflict with *Big Horn* is mistaken and provides no basis for review by this Court.

In *Big Horn*, the Wyoming court analyzed the Shoshone and Arapaho Tribes' water rights claims in light of the purposes for which the Wind River Reservation had been established. The reservation in fact had been selected because it lay in the Big Horn River valley with fertile land and an abundant surface water supply. *United States v. Mazurie*, 419 U.S. 544, 546 (1975). The court determined that the sole purpose of the reservation was for agriculture, and that its purposes did not include mineral and industrial development. 753 P.2d. at 98. The Tribes' claims for municipal, domestic and commercial uses, for which they had sought a separate water right, were further determined to be subsumed within the Tribes' agricultural water right. *Id.* at 99. In substance, the court determined that the purposes of the Wind River Reservation were satisfied entirely by the Tribes' surface water right for agriculture, an amount in excess of 500,000 acre-feet.[14]

Only after its finding that the reservation's water rights were limited to agricultural uses did the Wyoming Supreme Court address the application of the reserved water rights doctrine to groundwater. The court recognized that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." *Id.* at 99 (citing *Tweedy v. Texas Company*, 286 F. Supp. 383, 385 (D. Mont. 1968)("whether the [necessary] waters were found on the surface of the land or under it should make no difference")). Nonetheless, the Wyoming court concluded, without analysis or explanation,[15]

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[14] The Arizona courts in this case, of course, have not made any comparable study of the purposes or water needs of any Indian reservations.

[15] The *Big Horn* court did note that "not a single case applying the reserved water doctrine to groundwater is cited to us." 753 P.2d at 99, but then cites *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974),

that "the reserved water doctrine does not extend to groundwater." *Id.* at 100. Given the facts of the case, where the agricultural purposes of the Wind River Reservation could be wholly satisfied by available surface water, this conclusion was *dicta*.

The Arizona Supreme Court, on the other hand, was "fairly confronted with the issue." App. A17. After careful analysis of the relevant judicial precedents and Arizona statutory law, the court affirmed the trial court's determination that "the federal reserved water right doctrine applies not only to surface water but to groundwater." *Id.* at A24. The Arizona court pointed out, however, that a final determination of reserved rights to water requires "fact-intensive inquiries that must be made on a reservation-by-reservation basis" and that groundwater, if an intent to reserve it is found, still will be limited to the amount necessary if "other waters are inadequate to accomplish the purpose of a reservation." The "fact-intensive inquiries" mandated by the Arizona court, of course, are the same as and thus consistent with the reservation purposes analysis made by the Wyoming court. Accordingly, there is no conflict between the basic approaches to reserved water rights utilized by the two state courts, and no basis for review by this Court at this time.

Finally, petitioners' claim of "uncertainty" caused by the Arizona court's decision is also mistaken. *See* Phelps Dodge Pet. at 28-29; Salt River Pet. at 11-13 (citing *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244 (Mont. 1999) (Rodeghiero, J., dissenting)). The existence of reserved water rights claims to groundwater creates no greater uncertainty than reserved rights claims to surface water. The petitioners' claim of uncertainty is nothing more than a retread of the age-old argument raised against the existence of

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which did so hold prior to this Court's decision on review reserving judgment on the question. *Cappaert v. United States*, 426 U.S. at 143.

reserved water rights *in toto*. Such arguments have been made to no avail at least since this Court first announced the Indian reserved rights doctrine in *Winters v. United States*. Indeed, the non-Indians in *Winters* argued that "if the claim of the United States and the Indians be maintained, the lands of the defendants and the other settlers will be rendered valueless, and said communities will be broken up, and the purpose and object of the government in opening said lands for settlement will be wholly defeated." 207 U.S. at 570. The argument was not accepted there nor in any subsequent cases. *See, e.g., Arizona v. California*, 373 U.S. at 599 ("Much the same argument made to us was made in Winters to persuade the Court to hold that Congress had created an Indian Reservation without intending to reserve waters necessary to make the reservation livable."). Likewise, petitioners' claim of uncertainty here presents no basis for this Court's review of the decision below.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Briefs in Opposition of other respondents, the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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EXHIBIT A

IN THE SUPERIOR COURT OF THE STATE OF
ARIZONA IN AND FOR THE COUNTY OF APACHE

No. 6417

IN RE THE GENERAL ADJUDICATION OF
ALL RIGHTS TO USE WATER IN THE LITTLE
COLORADO RIVER SYSTEM AND SOURCE

STATE OF ARIZONA'S JOINDER IN MOTION TO SET PRETRIAL CONFERENCE

DATE OF FILING: APRIL 17, 2000

The State of Arizona joins in the Motion to Set Pretrial Conference filed by Claimants Arizona Public Service Company (APS), Phelps Dodge Corporation (Phelps Dodge), and Aztec Land and Cattle Company, (Aztec) and urges this Court to grant that Motion.

The State of Arizona agrees that the litigation of tribal claims and objections to tribal claims will require this court to address complex legal and factual issues. The early resolution of certain threshold issues and the appropriate phasing of the litigation may greatly expedite the process, reduce the costs to the litigants, and promote the efficient use of scarce judicial resources. A pretrial conference is the correct forum in which to establish appropriate pretrial procedures. The State of Arizona therefore urges this Court to grant the Motion to Set Pretrial Conference

RESPECTFULLY SUBMITTED this 20th day of April, 2000.

/s/ JANET NAPOLITANO
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Supreme Court, U.S.
FILED
MAY 19 2000
CLERK

(6) (4)

Nos. 99-1388 and 99-1389

In the Supreme Court of the United States

PHELPS DODGE CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a federal reserved water right may be satisfied from groundwater that, under Arizona law, is not subject to the doctrine of prior appropriation.

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In the Supreme Court of the United States

No. 99-1388

PHELPS DODGE CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

No. 99-1389

SALT RIVER VALLEY WATER USERS' ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of the State of Arizona (Pet. App. A1-A31) is reported at 989 P.2d 739. The order of the Superior Court of the State of Arizona (Pet. App. D1-D30) is unreported.

JURISDICTION

The decision of the Arizona Supreme Court was entered on November 19, 1999. The petitions for a writ of certiorari were filed on February 17, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a). As discussed at pages 8-15, *infra*, this Court

does not have jurisdiction because the Arizona Supreme Court's interlocutory opinion is not a final judgment within the meaning of 28 U.S.C. 1257(a).

STATEMENT

Petitioners seek review of an interlocutory decision of the Arizona Supreme Court in an ongoing general stream adjudication of the Gila River System. The United States was joined as a defendant under the McCarran Amendment, 43 U.S.C. 666. The Arizona Supreme Court certified a set of issues for interlocutory appeal, and that court addressed two of those issues, involving the relationship between federal reserved water rights and Arizona's system for administering groundwater, in the decision that petitioners ask this Court to review.

1. This Court ruled in *Winters* v. *United States*, 207 U.S. 564 (1908), that the establishment of an Indian reservation carries with it an implicit reservation of sufficient water to accomplish the purpose of the reservation. The Court has recognized that principle, sometimes referred to as the *Winters* doctrine or the doctrine of federal reserved water rights, on numerous occasions. See, *e.g.*, *United States* v. *New Mexico*, 438 U.S. 696, 698 (1978); *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976); *Arizona* v. *California*, 373 U.S. 546, 599-600 (1963); see also *United States* v. *City & County of Denver*, 656 P.2d 1, 17-18 (Colo. 1983). The *Winters* case involved an Indian reservation, but the Court has made clear that the principle applies to other types of federal reservations. See *Cappaert*, 426 U.S. at 138 (national monument); *Arizona* v. *California*, 373 U.S. at 601 (Indian reservations created by executive order, national forests, national recreation areas, and national wildlife refuges).

The Court will recognize a federal reserved water right if the circumstances surrounding the creation of a federal reservation indicate that the government intended to set aside water for a federal purpose. See *Cappaert*, 426 U.S. at 139. The Court infers that the government intended to do so if water is "necessary to accomplish the purposes for which the reservation was created." *Ibid.*; accord *New Mexico*, 438 U.S. at 702 ("Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.").

The determination of the parameters of the federal reserved water right, such as the amount of water reserved, inevitably requires a fact-intensive inquiry. See *Denver*, 656 P.2d at 20. Because federal reserved water rights are established by federal law, they can, and frequently do, have different characteristics than water rights created under state law. See, *e.g.*, *Cappaert*, 426 U.S. at 145; see also *United States* v. *Jesse*, 744 P.2d 491, 494 (Colo. 1987).

2. Arizona law generally classifies water into three categories: (1) surface water, such as lakes, ponds, rivers, and streams, including underground streams; (2) "subflow" groundwater that is closely connected hydrologically to surface water; and (3) "percolating" groundwater that is not so closely connected to surface water. See Pet. App. A10-A11. Rights to the first two categories, surface water and subflow groundwater, are governed by the state law doctrine of "prior appropriation." Rights to percolating groundwater, however, are

subject to the state law doctrine of "reasonable use." See *id.* at A10.[1]

Prior appropriation rights differ significantly from reasonable use rights. Under the doctrine of prior appropriation, "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time." *Arizona* v. *California*, 373 U.S. at 555. The reasonable use doctrine, on the other hand, permits a landowner to capture as much of the groundwater underlying the landowner's property as can be used on the overlying land, regardless of whether the landowner's pumping of groundwater diminishes the water available to others. See *Bristor* v. *Cheatham*, 255 P.2d 173, 180 (Ariz. 1953). Under the "reasonable use" doctrine, no groundwater user has a secure right to pump a specific quantity of water, because pumping is always susceptible to being interfered with, without liability, by neighbors making reasonable use of groundwater on their overlying land. See, *e.g.*, *Farmers Inv. Co.* v. *Bettwy*, 558 P.2d 14, 25 (Ariz. 1976) (Cameron, C.J., dissenting).

The Arizona Supreme Court's decision here addressed the issue of whether the United States can claim a federal reserved right to water that Arizona would classify as "percolating groundwater." In petitioners' view, a federal reservation's rights to percolat-

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[1] Arizona has also enacted legislation that addresses groundwater use. See Ariz. Rev. Stat. Ann. §§ 45-401 *et seq.* (West 1994 & Supp. 1999). That legislation, which is not at issue here, may play a significant role in regulating groundwater in certain areas of the State. See John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L.J. 657, 707-725 (1988).

ing groundwater should be governed by Arizona's reasonable use doctrine. The question is potentially significant because, if a federal reservation were subject to the "reasonable use" doctrine, it might potentially be entitled to more groundwater than under the federal reserved water rights doctrine, but the right would be less secure, because the groundwater source would be subject to depletion by groundwater pumping on adjacent land. A federal reserved water right, by contrast, would limit the federal reservation to the quantity of groundwater necessary to fulfill the needs of the reservation, but it would also prevent adjacent landowners from pumping groundwater if that pumping interferes with the reservation's right to receive sufficient water to meet its needs. See *Cappaert*, 426 U.S. at 142-143.

3. This case arose out of a general stream adjudication in accordance with Arizona law. See Ariz. Rev. Stat. Ann. §§ 45-251 to 45-260 (West 1994 & Supp. 1999). The adjudication will determine all rights to use waters of the Gila River System in Arizona. The adjudication's history is described in *Arizona* v. *San Carlos Apache Tribe*, 463 U.S. 545, 557-559 (1983). See also *In re Rights to the Use of the Gila River*, 830 P.2d 442, 444-445 (Ariz. 1992); *United States* v. *Superior Court*, 697 P.2d 658, 663-664 (Ariz. 1985). The United States claims federally reserved water rights to the use of certain waters in the Gila River System on its own behalf and as trustee for several Indian reservations. The United States also claims water rights arising under Arizona law, as well as rights confirmed by the 1935 Globe Equity Decree entered by the United States District Court for the District of Arizona. See *United States* v. *Gila Valley Irrigation Dist.*, 961 F.2d 1432 (9th Cir. 1992) (action to enforce the 1935 decree).

In 1988, during the early phases of this adjudication, the trial court entered a "Groundwater/Surface Water Order" that addressed several general physical and legal aspects of groundwater-surface water relationships, including various generic issues regarding federal reserved water rights. See Pet. App. D1-D32. The court's order included a ruling that "federal reserved water rights apply to both surface water and groundwater sources on and off the reservation whose diversion affects reservation sources, to the extent that there is not enough water left to satisfy the reservation's purpose." *Id.* at D23.

Numerous parties petitioned the Arizona Supreme Court for interlocutory review of the Groundwater/Surface Water Order. The Arizona Supreme Court granted some of the petitions, granted others in part, and denied others. See Pet. App. B1-B17. The Arizona Supreme Court certified six issues for interlocutory appeal. See *id.* at B2-B3. Among the certified questions was the issue of whether federal reserved water rights in Arizona extend to groundwater that is not subject to the doctrine of prior appropriation under Arizona law. See *id.* at B3.

The Arizona Supreme Court's determination of the certified questions was interrupted by a 1995 challenge to the constitutionality of Arizona legislation that amended certain provisions of state water law. See Pet. App. A7-A9. The Arizona Supreme Court has since resumed consideration of the certified questions and has unanimously ruled that "[f]ederal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation." *Id.* at A30. The court explained that

> if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand. The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

Id. at A20. The court acknowledged that its ruling would recognize water rights in connection with federal reservations that they would not have under state law, but noted that it could not apply state law "where to do so would defeat federal water rights." *Id.* at A22. Finally, the court noted that its decision

> do[es] not * * * decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.

Id. at A24.

ARGUMENT

This Court should decline to review the Arizona Supreme Court's decision because that decision is not a final judgment within the meaning of 28 U.S.C. 1257(a), the jurisdictional provision that governs this Court's review of state court decisions. Even if the Arizona

Supreme Court's decision were final, further review is unwarranted because the decision is correct and does not create any conflict with other decisions that would warrant the Court's review at this time.

1. This Court has jurisdiction to review by writ of certiorari decisions by the highest court of a State involving federal law if the state court decision is a "[f]inal judgment[] or decree[]." 28 U.S.C. 1257(a). The Arizona Supreme Court's avowedly "interlocutory opinion[]" (Pet. App. A6) in this case does not constitute a final judgment for purposes of 28 U.S.C. 1257(a). This Court therefore should deny the petitions for a writ of certiorari.

a. Section 1257(a) "establishes a firm final judgment rule." *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997). "To be reviewable by this Court, a state-court judgment must be final 'in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.'" *Ibid.* (quoting *Market Street Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945)). The finality rule "is not one of those technicalities to be easily scorned" but instead "is an important factor in the smooth working of our federal system." *Ibid.* (quoting *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945)).[2]

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[2] In *Jefferson*, the petitioner asked this Court to review whether a state wrongful death statute governs recovery of damages when a decedent's estate claims, under 42 U.S.C. 1983 (Supp. III 1997), that the death resulted from a deprivation of federal rights. See 522 U.S. at 77. The state supreme court had decided that question of federal law on a pretrial interlocutory certification by the trial court. This Court initially granted a petition for a writ

The Arizona Supreme Court's decision in this case is plainly not a final judgment. Like the order at issue in *Jefferson*, it is an "avowedly interlocutory" decision that arose from the state court's decision to certify certain questions. Compare *Jefferson*, 522 U.S. at 81, with Pet. App. A6, A8. The Arizona Supreme Court's decision does not terminate the litigation or resolve any of the claims in the water adjudication. Rather, it simply provides guidance to the trial court on several preliminary matters respecting the federal water rights claims. As the Arizona Supreme Court stated:

> We decide this issue in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater.

Pet. App. A24. The Arizona Supreme Court's decision is clearly an "intermediate step[]"—and not that court's "final word"—on the federal water rights claims. See *Jefferson*, 522 U.S. at 81. As in *Jefferson*, the petitioners' challenges may become moot as the litigation progresses. If they do not become moot, petitioners will be able to seek this Court's review "when the state-court proceedings reach an end." *Id.* at 77-78, 82-83.

b. Here, as in *Jefferson*, the state supreme court's decision does not fall "within the 'limited set of situations in which [the Court has] found finality as to the federal issue despite the ordering of further proceedings in the lower state courts.'" 522 U.S. at 82 (quoting *O'Dell* v. *Espinoza*, 456 U.S. 430 (1982) (per curiam)).

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of certiorari on that question, but, after argument, "dismiss[ed] the writ for want of a final judgment." *Id.* at 78.

Specifically, the decision does not fall within any of the four situations that the Court identified in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), in which the decision of a state court is effectively final notwithstanding the prospect of further state court action.[3]

The Arizona Supreme Court's decision plainly does not fall within the first two categories identified in *Cox Broadcasting*, which involve situations in which the court's interlocutory decision effectively resolves the federal claim, regardless of proceedings on remand, and the decision is therefore final for purposes of this Court's review. In this case, the state supreme court's decision leaves no doubt that final resolution of the federal claim depends on proceedings on remand. The state supreme court ruled that "[f]ederal reserved

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[3] *Cox Broadcasting* identifies four categories of cases in which a state court decision may satisfy Section 1257(a)'s finality requirement, notwithstanding the pendancy of proceedings on remand: (1) "cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained"; (2) "cases * * * in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings"; (3) "situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case"; and (4) "situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." See 420 U.S. at 477-483.

rights extend to groundwater *to the extent groundwater is necessary to accomplish the purpose of a reservation.* Pet. App. A30 (emphasis added). Thus, under the interlocutory ruling of the Arizona Supreme Court, the United States will not be entitled to satisfy a federal reserved water right from groundwater unless it additionally demonstrates, in the proceedings on remand, that a particular reservation at issue in this case requires groundwater to accomplish the purposes of the reservation. Thus, the federal issue decided here is not ripe for review "regardless of the outcome of future state-court proceedings." *Jefferson*, 522 U.S. at 82 (quoting *Cox Broadcasting*, 420 U.S. at 480).

The Arizona Supreme Court's decision also does not fall into the third category described in *Cox Broadcasting*, which involves the situation in which the state court has resolved a federal claim and remanded the case for further proceedings, "but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Jefferson*, 522 U.S. at 82 (quoting *Cox Broadcasting*, 420 U.S. at 481). That situation typically arises where a state court reverses a criminal conviction on federal constitutional grounds and remands for retrial. If the State obtains a conviction on retrial, the federal issue is moot, and if the State obtains an acquittal on retrial, the Double Jeopardy Clause would foreclose an appeal to revisit the state court's resolution of the federal constitutional issue. See *Cox Broadcasting*, 420 U.S. at 481. This case does not present that problem. Here, as in *Jefferson*, petitioners would be free to seek this Court's review if the state court finally determines the relevant issues in a way that is adverse to petitioners' interests. See *Jefferson*, 522 U.S. at 82-83.

The petitioners in No. 99-1388 ultimately rely on the fourth category described in *Cox Broadcasting*. See 99-1388 Pet. 9-13.[4] That category embraces the situation in which (a) the party seeks review of a federal issue that "has been finally determined by the state courts for purposes of the state litigation"; (b) the party might prevail on remand on non-federal grounds, but reversal of the state court on the federal issue would preclude "any further litigation on the relevant cause of action"; and (c) this Court's "refusal immediately to review the state-court decision might seriously erode federal policy." *Cox Broadcasting*, 420 U.S. at 483. The Arizona Supreme Court's decision, however, satisfies none of the three criteria.

First, the decision does not "finally determine[]" any federal water rights claim; the state supreme court remanded the case for the trial court to determine the individual federal reserved water claims based on the underlying purposes of each federal reservation. Second, the decision does not preclude further litigation on the relevant cause of action. The United States has asserted federal reserved water rights for various federal reservations without regard to whether the water source is surface water or groundwater, and the state court must determine the federal reserved rights for each reservation, regardless of whether groundwater is included or excluded. Third, the Arizona Supreme Court's recognition that the federal government may establish a federal reserved water right that includes groundwater, provided it makes the requisite showing of a federal intent to reserve the water, does not "erode" any federal policy. Rather, the court's

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[4] The petitioners in No. 99-1389 do not address the finality issue.

ruling effectuates both the policy of providing water to satisfy the needs of federal reservations consistent with the *Winters* doctrine and the overarching constitutional principle that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. Art. IV, § 3, Cl. 2. See discussion at 15-19, *infra*.

c. Petitioners suggest (99-1388 Pet. 13) that this Court has created a special exception to the finality requirement for water rights adjudications, citing *United States* v. *New Mexico*, 438 U.S. 696 (1978), and *Wyoming* v. *United States*, 492 U.S. 406 (1989) (per curiam). Each of those cases, however, fell squarely within the second situation described in *Cox Broadcasting*. In *New Mexico*, the New Mexico Supreme Court had rejected the United States' claim of an entitlement to use water within the Gila National Forest for particular recreational and wildlife purposes. See *Mimbres Valley Irrigation Co.* v. *Salopek*, 564 P.2d 615 (1977), aff'd, 438 U.S. 696 (1978). In *Wyoming*, the Wyoming Supreme Court had determined a quantification of the United States' water rights claim for the Wind River Indian Reservation in Wyoming under the practicably irrigable acreage standard. See *In re General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (1988), cert. denied, 492 U.S. 926 (1989). In each of those cases, the state supreme court's judgment was final for purposes of Section 1257(a) because the judgment finally determined the federal reserved water rights claim for a specific reservation and any further proceedings on remand would not affect the outcome for the reservation in question.

The Arizona Supreme Court's decision in this case presents a markedly different situation. The state court has not determined federal reserved water rights for *any* individual federal reservation. It has simply resolved one of several threshold issues for quantifying the United States' water rights for various reservations. The decision leaves to future litigation the "inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." Pet. App. A24. There is no warrant for this Court to assume jurisdiction at this juncture, where the state supreme court has not determined whether "any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." *Ibid.*

2. Even in the absence of the jurisdictional obstacle, the Arizona Supreme Court's ruling would not warrant this Court's review, especially at this interlocutory stage of the case. The state supreme court's decision is correct, it will have no immediate impact on any water user, and there is no conflict among the lower courts that would warrant the Court's review at this time.

a. The Arizona Supreme Court reached the common sense conclusion that "if the United States implicitly intended, when it established reservations, to reserve sufficient unappropriated water to meet the reservations' needs, it must have intended that reservation of water to come from whatever particular sources each reservation had at hand." Pet. App. A20. As the court correctly observed,

> The significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground but whether it is necessary to accomplish the purpose of the reservation.

Ibid. The state supreme court accordingly held that "the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater." *Id.* at A24. "Federal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation." *Id.* at A30.

The Arizona Supreme Court's ruling is unremarkable. There can be no serious doubt that Congress has the constitutional power to reserve unappropriated water for federally owned lands and to authorize the Executive Branch to make such reservations. See, *e.g.*, U.S. Const. Art. IV, § 3, Cl. 2; *Arizona* v. *California*, 373 U.S. at 597-601. As the state supreme court recognized, the question is simply one of federal intent. There is no reason to believe, as an "abstract" principle (Pet. App. A24), that the United States can never reserve that particular subset of groundwater that Arizona jurisprudence labels "percolating" groundwater. Rather, when the United States reserves water and does not designate the source, it is reasonable to conclude that the water would be taken from whatever water source is available to the reservation to meet the needs of the reservation. See *id.* at A19.[5]

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[5] As the state supreme court explained, "The reservations considered [in *Winters* v. *United States* and *Arizona* v. *California*] depended for their water on perennial streams. But some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for habitation without reserving the water necessary to sustain life." Pet. App. A19.

Petitioners' objections to the Arizona Supreme Court's ruling do not require extended discussion. There is no merit to petitioners' contention that the state supreme court's decision "frustrates clear federal policies and conflicts with controlling decisions of this Court." 99-1388 Pet. 14-22 (capitalization removed). To the contrary, the Arizona Supreme Court's decision effectuates the important federal policy, recognized in this Court's decisions, of ensuring that federally owned lands that are set aside for federal purposes have sufficient water to fulfill those purposes. See, *e.g.*, *Cappaert*, 426 U.S. at 143 ("Thus, since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or ground water.").

Petitioners are also plainly wrong in contending that the state supreme court departed from this Court's teachings by "finding a federal reserved right to groundwater without considering the purposes of any specific reservation." 99-1388 Pet. 14-16 (capitalization altered). The state court made clear it was merely addressing the question of whether federal reserved rights must, in Arizona, apply only to surface water and are incapable, as a matter of law, of including groundwater. The court explicitly stated that its decision did not "decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." Pet. App. A24.

Petitioners are likewise mistaken in arguing that the Arizona Supreme Court should have "integrate[d] federal groundwater rights with existing state groundwater law." 99-1388 Pet. 16-17 (capitalization altered). In petitioners' view, the state supreme court should

have relied upon "the application of Arizona groundwater law in determining the nature of federal rights to groundwater." *Id.* at 17. The state supreme court correctly recognized, however, that this Court "has defined the reserved rights doctrine as an exception to Congress's deference to state water law." Pet. App. A21 (citing, *e.g.*, *New Mexico*, 438 U.S. at 714); see *Cappaert*, 426 U.S. at 145 ("determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation").[6]

Petitioners also assert that the Arizona Supreme Court has created a federal common law of reserved rights in groundwater and that, in doing so, it should have adopted "state law as the rule of decision." 99-1388 Pet. 17-22; 99-1389 Pet. 23-28; Arizona Response 20. That argument, however, misconceives the Arizona Supreme Court's decision. The court did not create a

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[6] Petitioners erroneously suggest that this Court's statement in *Cappaert* that a "reserved right in unappropriated water" is "superior to the rights of future appropriators" (426 U.S. at 138) indicates that federal reserved water rights apply only to water that could be appropriated under state law. 99-1388 Pet. 16. Petitioners' interpretation ignores the context of that statement. The Court used the term "unappropriated" as a short-hand expression for waters to which no vested rights had attached prior to the date of the creation of the federal reservation. It made that understanding clear elsewhere in the opinion when it stated that "the issue is whether the Government intended to reserve unappropriated *and thus available* water." 426 U.S. at 139 (emphasis added). The significance of water being "unappropriated" is that no prior rights have attached to it and, therefore, it is "available" to satisfy the purposes of the federal reservation. The United States can also reserve available water that is not subject to appropriation under state law. Indeed, if petitioners' contention were correct, it would lead to a stark anomoly: Congress could reserve water only in those States that adopted an appropriative water rights system. Nothing in the Property Clause ties Congress's hands in that way.

new body of federal common law; rather it simply adhered to this Court's reasoning in *Winters*, *Cappaert*, and *New Mexico* and refused to carve out a special exception to the federal reserved water rights principles articulated in *Winters* and subsequent cases based on a State's "arti[ficial]" distinctions between surface flow, subflow, and "percolating groundwater." See Pet. App. A10-A12. The Arizona Supreme Court's decision follows *a fortiori* from this Court's decisions: "the federal reserved right extends to groundwater when groundwater is necessary to accomplish the purpose of a federal reservation." *Id.* at A27.

There is no warrant for adopting state water law principles to determine federal water rights–especially when, as the Arizona Supreme Court candidly acknowledged, those principles rest on "a hydrological misconception." See Pet. App. A11. This Court made clear in *Cappaert* that the "determination of reserved water rights is not governed by state law but derives from the federal purpose of the reservation." 426 U.S. at 145. The Arizona Supreme Court correctly recognized that federal reserved rights are determined through "fact-intensive inquiries that must be made on a reservation-by-reservation basis" (Pet. App. A24) and not through the wholesale adoption of state rules of decision that are likely to have no direct bearing on (or may even directly frustrate) the "federal purpose of the reservation." See *Cappaert*, 426 U.S. at 143-146.

b. Some of the petitioners contend that the Arizona Supreme Court's decision will have "grave" and "disastrous" consequences for Arizona water users. 99-1389 Pet. 15-23; see also 99-1388 Pet. 22-24. Those assertions are hyperbole. The state supreme court affirmed a *1988* trial court ruling that "the federal reserved water rights doctrine applies not only to surface water but to

groundwater." Pet. App. A24; see *id.* at D23. The state supreme court also made clear that its decision does not "decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater." *Id.* at A24. The situation is no different now than it was before the state supreme court's ruling, save that the state supreme court has now affirmed the trial court's long-outstanding determination of a particular legal issue that may or may not have significance with respect to any particular federal reservation. The state supreme court's interlocutory decision will have no immediate impact, and its ultimate practical effect cannot be judged until the trial court adjudicates the United States' water rights claims.[7]

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[7] Petitioners have no basis for suggesting that "most of the heretofore non-appropriable groundwater would be controlled by a few federal enclaves" or that "[m]ost other landowners * * * would be forced to cease or sharply curtail their pumping [of groundwater], causing extensive dislocation and hardship." 99-1389 Pet. 20-21. Indeed, petitioners' predictions that grave consequences will result from the Arizona Supreme Court's decision contradict their later assertion that Arizona law already entitles federal reservations to sufficient groundwater to meet the reservations' purposes. See *id.* at 24. Furthermore, a significant premise underlying the petitioners' arguments—that most of Arizona's groundwater is "percolating" groundwater—is open to debate. As the state supreme court explained, Arizona law distinguishes between "subflow" groundwater, which is subject to the doctrine of prior appropriation and "percolating" groundwater, which is not. Pet. App. A10-A11. The boundary between subflow groundwater and percolating groundwater "is, to some extent, artificial and fluid" and remains to be resolved by Arizona courts. *In re General Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 857 P.2d 1236, 1246 (Ariz. 1993) (vacating and remanding to the trial court for a determination of the criteria for differentiating between appropriable subflow and percolating groundwater). If the Arizona courts define the subflow zone

c. Petitioners also claim that the Arizona Supreme Court's decision warrants review because it is in conflict with the Wyoming Supreme Court's decision in *In re General Adjudication of All Rights to Use Water in the Big Horn River, supra.* See 99-1388 Pet. 28- 29; 99-1389 Pet. 11-12; Arizona Response 13. The Wyoming Supreme Court acknowledged that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." 753 P.2d at 99. It nevertheless ruled, contrary to that logic, that the reserved water doctrine "does not extend to groundwater." *Id.* at 100. The Wyoming Supreme Court reached that result because it could find no case expressly holding that federal reserved water rights extend to groundwater. See *id.* at 99-100.

The Arizona Supreme Court properly rejected the Wyoming Supreme Court's reasoning. The Arizona Supreme Court stated:

> We can appreciate the hesitation of the *Big Horn* court to break new ground, but we do not find its reasoning persuasive. That no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so.

Pet. App. A17.[8] The Arizona Supreme Court has now provided a persuasive decision squarely holding that

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broadly, then the issue of whether federal reserved rights extend to percolating groundwater may turn out to be relatively unimportant.

[8] The Arizona Supreme Court also noted that there is more precedential support for its result than the *Big Horn* decision suggested. See Pet. App. A16 n.6, A17-A20 (discussing relevant cases).

the reserved water rights doctrine extends to groundwater. It is therefore possible that, if the Wyoming Supreme Court were faced with the issue again, it might well reconsider its decision and reach the "logical" outcome. At a minimum, the apparently divergent decisions of the Arizona Supreme Court and the Wyoming Supreme Court—which reflect the views of only two of the fifty States and have not yet resulted in any practical consequences for any water user—do not give rise to a mature conflict that would warrant this Court's review. Accordingly, even if the Arizona Supreme Court's decision were a final judgment for purposes of 28 U.S.C. 1257(a), it would not present a matter warranting this Court's review at this time.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Nos. 99-1388, 99-1389

IN THE

Supreme Court of the United States

PHELPS DODGE CORPORATION, *et al.*,

Petitioners,

-and-

SALT RIVER VALLEY WATER USERS' ASSOCIATION, *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF IN OPPOSITION FOR RESPONDENTS THE SAN CARLOS APACHE TRIBE, THE TONTO APACHE TRIBE AND THE YAVAPAI-APACHE NATION

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INTRODUCTION

Respondents are the San Carlos Apache Tribe, the Tonto Apache Tribe and the Yavapai-Apache Nation, all federally recognized Indian tribes located on federal reservations in Arizona (herein the "Apache Tribes").[1] The Apache Tribes' Brief in Opposition responds to the Petitions filed by Phelps Dodge and Salt River Project.[2]

The Respondents Apache Tribes were before this Court in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983) (herein "*San Carlos*"). Seventeen years later, not a single water right has been adjudicated in the Arizona stream adjudication.[3]

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1. The law firm of Sparks, Tehan and Ryley, P.C., undersigned counsel has represented the Apache Tribes since 1974 in these matters and was designated by the Arizona Supreme Court as lead counsel to represent Arizona Indian tribes in *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) (herein *"Gila River III"*). *See also In the Matter of the Rights to the Use of the Gila River*, 830 P.2d 442 (1992) (*"Gila River I"*) (Interlocutory Issue 1) (trial court procedures approved, including service by mail); and *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 857 P.2d 1236 (1993) (*"Gila River II"*) (Interlocutory Issue 2) (the "subflow" issue, remanded to trial court with second decision by the Arizona Supreme Court now pending).

2. *See* Petitions for Writ of Certiorari filed by, *Phelps Dodge Corporation, et al.* (herein "Phelps Dodge") *v. United States, et al.*, No. 99-1388; *and Salt River Valley Water Users' Association, et al.* (herein "Salt River Project") *v. United States, et al.*, No. 99-1389. The Phelps Dodge and Salt River Project petitions seek review by this Court of Issue 4 decided by the Arizona Supreme Court in *Gila River III*, *i.e.*, that federal reserved rights extend to groundwater to the extent necessary to fulfill the purposes of a reservation.

3. Moreover, there has been no adjudication of any federal or state water rights in Arizona since the first general stream adjudication proceeding was initiated in 1974. *See* "Phelps Dodge Petition" at p. 5: "The magnitude of this case and the significance of the issues it raises have resulted in many years of litigation without any final adjudication of specific water rights."

The Apache Tribes appeared and have faithfully participated in the Arizona proceedings. *Id.* at 545 n.17. As instructed by this Court in *San Carlos*, the Arizona courts have honored the "solemn obligation to follow federal law." *Id.* at 571.

Petitioners complain here that the Supreme Court of Arizona has applied federal law in a preliminary decision that Indian reservations may have a reserved right to groundwater where the trial court finds that surface water is inadequate to accomplish the purposes for which the reservation was established. They argue that state law should have been adopted as the federal rule.

Arizona's groundwater law defies hydrological reality. *See United States v. J. Ed Smith*, 625 F.2d 278, 280 (9th Cir. 1980) at n.3. It is based upon an "artifice . . . that rests on a hydrologic misconception. 175 Ariz. at 389, 857 P.2d at 1243." *Gila River III* at 743. The Arizona Supreme Court observed that "conforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface water supplies." *Id.* at 744. Arizona has not. *See also Gila River II*, 857 P.2d at 1240.

Petitioners desire to apply this antiquated "political" hydrology to water rights for federal reservations. *Gila River III* at 747.

The Arizona Supreme Court recognized that some Indian reservations in Arizona "depend for present and future survival substantially or entirely upon pumping of underground water." *Gila River III* at 746. It has seen rivers pumped dry and Indian reservations "entirely dewatered" by off-reservation pumping under Arizona's "reasonable use" doctrine. *Id.* at 748.

In *San Carlos*, the Court cautioned that:

> . . . any state-court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate

> with the powerful federal interest in safeguarding those rights from state encroachment.

San Carlos at 571.

The Arizona Supreme Court reviewed state law and the history of the depletion of flowing streams and groundwater in Arizona, and determined that State law is inadequate to protect federal rights where groundwater is necessary to fulfill the purposes for which federal reservations were established. This Court honors the decisions of the States' highest court when interpreting state law. *Johnson v. Frankell*, 520 U.S. 911, 916, 117 S. Ct. 1800, 1894, 138 L. Ed. 2d 108 (1997); *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S. Ct. 760, 765, 97 L. Ed. 1105 (1953); *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 838, 98 S. Ct. 1535, 1541, 56 L. Ed. 2d 1 (1978); and *Reitman v. Mulkey*, 387 U.S. 369, 378-379, 87 S. Ct. 1627, 1633, 18 L. Ed. 2d 830 (1967).

The Arizona Supreme Court cited the reasoning of this Court in *Arizona v. California* in finding a reserved right to groundwater where this Court declared it is:

> "impossible to believe" that those who created the Colorado River Indian Reservation "were unaware that most of the lands were of the desert kind — hot, scorching sands — and that water from the [Colorado River and its tributaries] would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona v. California*, 373 U.S. at 599. The reservations considered in those cases depended for their water on perennial streams. But some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping of underground water. We find it no more thinkable in the latter circumstance than in the former that the United States reserved land for

> habitation without reserving the water necessary to sustain life.

Gila River III at 746.

The Arizona decision is necessarily "a preliminary judgment on the question of Indian water rights." *San Carlos* at 569.

Observing the Court's reasoning in *United States v. New Mexico*, the Arizona court found a reserved right to groundwater could only be found where other waters are inadequate to accomplish the purpose of a reservation. "To determine the purpose of a reservation and to determine the water necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis." *United States v. New Mexico*, 438 U.S. at 700. *Gila River III* at 748.

Gila River III is abstract:

> In Part III we declined in the abstract to declare a standard for determining the purpose of a reservation. We here decline in the abstract to define how imminent a threat to a reservation's essential waters must be in order to warrant injunctive relief. The latter standard, like the former, should be grounded in the bedrock of the facts.

Gila River III at 705.[4]

Eventually, after a trial on the merits concerning a specific reservation, these intimately related federal questions will be decided in a factual setting and reviewed by the Arizona Supreme Court. A "final judgment" has long been the standard of the Court in these cases. If Petitioners can show specific harm in violation of federal law under a final judgment at that time, this Court would have jurisdiction under 28 U.S.C. § 1257(a).

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4. In *United States v. Cappaert*, a standard was crafted that protected the purpose for which Devil's Hole National Monument was established after extensive fact findings to determine the measures necessary to protect the federal purpose. *See also San Carlos* at 571.

At this point in the Arizona proceedings, *Gila River III* merely assures that state groundwater pumpers are on notice[5] and are participating in the adjudication as is necessary to preserve the comprehensive requirements of the McCarran Amendment[6] and to avoid piece-meal adjudication.[7] *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976) (herein "Colorado River"). *Gila River I.*

PARTIES TO THIS BRIEF IN OPPOSITION

Respondents, San Carlos Apache Tribe, Tonto Apache Tribe and Yavapai-Apache Nation ("Apache Tribes") are parties in "In Re The General Adjudication Of All Rights To Use Water In The Gila River System And Source," Consolidated Case Nos. W1-4.

The Apache Tribes are federally recognized pursuant to the Apache Treaty, July 1, 1852, 10 Stat. 979, and Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.* The Reservations of the Tribes are all within their original aboriginal homelands under the Apache Treaty. *See United States v. Santa Fe Pacific Railroad Co.*, 315 U.S. 339 (1941), *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983). *In the Treaty of Guadalupe Hidalgo*, 9 Stat. 922, Feb. 2, 1848, the Apache Tribes were to be free and secure in their tribal homelands. *See id.* Articles VIII, IX, XI, XXII.2.

A. The San Carlos Apache Tribe.

The San Carlos Apache Reservation (herein "the Reservation") was established by Executive Orders of President Grant on November 9, 1871, and December 14, 1872. There are approximately two thousand eight hundred and fifty-five (2,855) square miles within the current Reservation (1,827,200

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5. *See Gila River I, Gila River III* at 748.

6. The McCarran Amendment, 43 U.S.C. § 666 (herein "McCarran Amendment"), *Arizona v. San Carlos, id.* at 565 n.16, 569, 570; *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 819 (1976).

7. *Moses H. Cone Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 16 (1983).

acres). The United States holds title to the lands within the Reservation in trust for the benefit of the San Carlos Apache Tribe. The Reservation is in Gila, Graham, and Pinal Counties in eastern Arizona. Tribal membership is approximately 12,000.

The Reservation is in the Upper Salt River, the Upper Gila River, and the San Pedro River "subwatersheds" of the Arizona General Stream Adjudication W-1 through W-4. Most major surface streams in central Arizona run through, border, arise on, or are tributary to surface and underground water on the Reservation, including without limitation, the Black River, Salt River, the Gila River, Ash Creek, Willow Creek, Eagle Creek, Bonita Creek, Deer Creek, Salt Creek, and San Pedro River.

The San Carlos Apache Reservation is surrounded on three sides by federal land administered by the National Forest and Bureau of Land Management. The north boundary of the San Carlos Apache Reservation is the south boundary of the White Mountain Apache Reservation. The San Carlos and White Mountain Apache Reservations were once one, but later divided along the Black and Salt Rivers into the two separate Reservations which exist today.

The Gila River is the only stream with a Decree (Globe Equity No. 59) which purports to adjudicate certain rights on the San Carlos Reservation. That Decree provides only 6,000 acre-feet of water for 1,000 acres of irrigation along the Gila River in the San Carlos Apache Reservation, with a priority date of 1846. All residential, governmental, and commercial water use on the Reservation is from underground wells. There is no present substantial surface water use or development on the Reservation, with the exception of stockwatering, wildlife, and recreation.

B. Tonto Apache Tribe.

The Tonto Apache Tribe is a federally recognized Indian Tribe pursuant to P.L. 92-470, 86 Stat. 783, October 6, 1972. The Tonto Apache Tribe consists of over 100 members on the 85 acre Tonto Reservation located south of Payson, Arizona in Gila County. One-half of the Reservation is in the upper Salt

sub-watershed and one-half of the Reservation is in the upper east Verde sub-watershed of the Arizona General Stream Adjudication W-1 through W-4.

The Tonto Apache Reservation is surrounded on three sides by the Tonto National Forest and on the north by the Town of Payson. The Reservation has no surface water supply. The Tribe relies upon groundwater from a well which was developed by the United States to serve the Reservation. The parcel of land where the Tribal well is located was later traded into private ownership by the National Forest. To protect the Tribal water supply, federal deed restrictions were placed on the patent of property by the United States which prohibits the private owner from polluting the groundwater and from withdrawing groundwater from the land around the well site. Nearby pumping has reduced the production of the federal well which is now inadequate to meet the present needs of the Tonto Apache Reservation.

C. Yavapai-Apache Nation.

A Reservation was established by Executive Order on October 3, 1871, ten miles on both sides of the Verde River for forty-five miles, which Reservation was to serve as a permanent tribal homeland for both Tribes "as long as the grass shall grow and the stream shall flow." The Yavapai-Apache Nation has approximately 2000 members.

In the late winter of 1875, both Tribes were forcibly removed from the Verde Valley In "Trail of Tears." On April 23, 1875, the Reservation was terminated by Executive Order. Tribal members were forced through the snow nearly 180 miles to the San Carlos Reservation where they were incarcerated. Many men, women, and children perished on the way. Some escaped on route and returned to the Verde Valley. The remaining survivors walked back from San Carlos to the Verde Valley beginning In 1886. Many arrived after the start of construction of Roosevelt Dam at the confluence of the Salt River and Tonto Creeks In 1909. They were permitted to leave San Carlos to work on the Dam, and then returned home to the Verde Valley.

When the Tribes returned from San Carlos, either by escape or permission, they found their homes, farms and communities occupied or dominated by non-Indians. Nevertheless, the Tribal members persisted and established new camp and farm sites. Over a period of years a number of parcels of land occupied by Tribal members were acquired in trust either by the United States by statute, gift or exchange.

The Yavapai-Apache Reservation consists of several parcels of land totaling approximately 653 acres located in the Valley of the Verde River, Yavapai County, Arizona. Reservation parcels of land are located near Clarkdale, near Camp Verde, near Middle Verde, near Rimrock and at the I-17 interchange for the Montezuma Castle National Monument. Each parcel has a different acquisition date ranging from 1909 to 1974.

The Yavapai-Apache Nation has approximately 2000 members. The Nation relies upon surface water from the Verde River for irrigation. It is totally dependent upon groundwater for all domestic, municipal and commercial purposes. Both surface water and groundwater are declining in the Verde Valley as a direct result of groundwater pumping in the Big Chino Valley, the Little Chino Valley near Prescott, Arizona, and pumping in the Verde Valley.

STATEMENT OF THE CASE

A. The Gila River Adjudication.

"The Gila River System is over appropriated; the supply of water presently available and which seems likely to be available in the future is not sufficient to satisfy the needs and demands of existing projects." *Arizona v. California*, Report of the Special Master, December 5, 1960, p. 325; *see also Gila River I* at 232 and *United States v. Gila Valley Irrigation District*, 920 F. Supp. 1444, 1448 (D. Ariz. 1996).

B. The Proceedings Below.

The Gila River stream adjudication began as an administrative proceeding in 1974 when Salt River Project filed a petition with the Arizona Land Department to determine the conflicting rights in the Salt River above Granite Reef Dam. In

its present form the Gila River adjudication is a consolidated effort to achieve "a comprehensive general stream adjudication to determine 'the nature, extent and relative priority' of the water rights of all who use the water of a 'river system and source' . . ." with respect to waters within the Upper Salt, Verde, Upper Gila, Lower Gila, Agua Fria, Upper Santa Cruz and San Pedro watersheds. *Gila River III* at 742.

Gila River III is the third case decided by the Arizona Supreme Court in Arizona's general stream adjudications within the context of six special interlocutory issues certified for review by the Arizona Supreme Court.[8]

The Petitions filed by Phelps Dodge Corporation and the Salt River Project have requested the Court to review only Issue 4 decided in *Gila River III*.[9] The Apache Tribes allege that Petitioners have attempted to bifurcate Issues 4 and 5 for purposes of this Court's review, because the *Gila River III* court's holding with respect to Issue 5 "fits four square" with the Court's decision in *Cappaert* and provides the logic and rationale for the *Gila River III* court's holding with respect to Issue 4.

SUMMARY OF ARGUMENT

Gila River III seeks to implement this Court's decision in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545

8. *See* Appendix to Petitions, Appendix B, pp. B1 and B2, the Arizona Supreme Court's "Orders Concerning Petitions for Interlocutory Review" filed December 11, 1990, which designated the six Interlocutory Issues for review by the Arizona Supreme Court, including Interlocutory Issues 4 and 5 decided in *Gila River III*; and the Arizona Supreme Court's "Special Procedural Order Providing for Interlocutory Appeals and Certifications" dated September 26, 1989, Phelps Dodge Petition, Appendix C.

9. Issue 4 as stated by the Arizona Supreme Court is "Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona Law?" Issue 4 is clearly a federal question. Issue 5 as stated by the Arizona Supreme Court is "Are federal reserved rights holders entitled to greater protection from groundwater pumping than are water users who hold only state law rights?" *See Gila River III* at 741. Issue 5 is clearly an interrelated federal question with Issue 4.

(1983) (herein "*San Carlos*"), wherein this Court decided in part that the McCarran Amendment provides state courts with jurisdiction to adjudicate Indian water rights and applies to all states, thus providing Arizona courts with the jurisdiction to adjudicate federal reserved water rights in Arizona's general stream adjudications, and decide federal reserved water right questions, such as, the Arizona Supreme Court decided in *Gila River III*.

The Court also held in *San Carlos* that state courts have a solemn obligation to follow federal law, and that there is a powerful federal interest in safeguarding federal reserved water rights from state encroachment. *San Carlos*, 463 U.S. at 571. *See also United States v. Superior Court*, 697 P.2d 658 (1985), which upheld the jurisdiction of Arizona courts to adjudicate federal rights in the general stream adjudication, and also upheld the constitutionality of Arizona's general stream adjudication procedures.[10]

The Apache Tribes respectfully submit that this Court lacks appellate jurisdiction to grant certiorari in this matter, because the Arizona Supreme Court's decision in *Gila River III* is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a).[11] *Gila River III* is interlocutory; and related federal questions must

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10. For a history of Arizona's general stream adjudications, *see San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179 (1999), a special action filed in the Arizona Supreme Court by the Apache Tribes, which held multiple legislative provisions enacted in 1995 relating to Arizona's general stream adjudications unconstitutional. This unconstitutional legislation delayed this adjudication four years.

11. *See Grays Harbor Logging Company v. Coats-Fordney Logging Company*, 243 U.S. 251 (1917); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 122, 123-124, 127 (1945); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (herein "*Cox Broadcasting*"); *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981); *Flynt v. Ohio*, 451 U.S. 619 (1981); *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); and *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997).

be decided in future trial court proceedings before it is determined that any federal reservation in Arizona has a reserved right to groundwater (*Gila River III* at 748).[12]

These federal questions include, but are not limited to, a trial court's determination that the purposes of a particular federal reservation entitles that reservation to groundwater; and that such reservation requires groundwater to satisfy its quantified federal reserved water rights. *Gila River III* at 750.

Until a trial court adjudicates all of these federal questions relating to whether a particular federal reservation has a federal reserved right to groundwater, and the Arizona Supreme Court reviews the decision, there is no final judgment with respect to Issue 4 which might be reviewable by this Court under 28 U.S.C. § 1257(a).

Assuming *arguendo* that *Gila River III* is a final judgment, the Court should refuse to exercise its discretion to accept jurisdiction because the decision in *Gila River III* is abstract in nature.[13] *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947). *See* Part VI herein.

The Arizona Supreme Court decided both Issues 4 and 5 in the affirmative, holding that: (1) federal reserved rights extend to groundwater to the extent necessary to accomplish the purpose

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12. The Court has held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent necessary to accomplish the purpose of that reservation. *Winters v. United States*, 207 U.S. 564 (1908) ("*Winters*"); *Arizona v. California*, 373 U.S. 546 (1963); and *Cappaert v. United States*, 426 U.S. 128 (1976) ("*Cappaert*"). This doctrine of federally reserved water rights has been extended to surface water. This Court has not yet decided if federally reserved water rights extend to groundwater.

13. In *Gila River III* at 748, the court stated: "We decide this issue [Issue 4] in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater."

of a reservation (Issue 4); and (2) holders of federal reserved rights to groundwater have the right to protect their groundwater from depletion by state groundwater pumpers to the extent necessary to accomplish the purpose of a reservation (Issue 5). It held that for the purpose of the federal reserved rights doctrine, it makes no difference whether water ". . . runs above or below the ground." *Gila River III* at 747.

Issues 4 and 5 were decided in the abstract because there has been no adjudication of the water rights of any federal reservation in Arizona. Issues 4 and 5 are inextricably related. *Gila River III* at 748, citing *Cappaert*.[14]

Presently there is no case or controversy. Petitioners can allege no present harm or constraint on their rights. Until a trial court decides that a particular reservation has a federal reserved right to groundwater, and the quantity and priority[15] of that right, state groundwater pumpers will continue to encroach upon and deplete[16] federal reserved groundwater

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14. In *Cappaert*, at 145, this Court held that federal reserved surface water rights are not dependent upon state law or state procedures, and that they are therefore protected from depletion from groundwater pumping authorized under state law.

15. The trial court must determine the priority date of the reservation's right to groundwater, Salt River Project Petition, another related federal question, since this issue was not explicitly addressed in *Gila River III*., *id.* at 20.

16. The Arizona Supreme Court noted in *Gila River III* that some Indian reservations have already been "dewatered" by "off-reservation" pumping. *Gila River III* at 748. The 26 year delay of the adjudication of water rights in the Arizona general stream adjudications has resulted in the permanent depletion of the federal reserved water supplies for some Indian reservations in Arizona. Interlocutory review by this Court now of the *Gila River III* decision, would only constitute further intolerable delay. *See United States v. Gila Valley Irrigation District*, 959 F.2d 242 (1992) where the San Carlos Apache Tribe attempted to protect its surface rights to the Gila River from encroachment by upstream groundwater pumpers.

as they have in the past, despite the decision in *Gila River III*.[17]

The Court should therefore deny the Petitions of Phelps Dodge and Salt River Project.

REASONS FOR DENYING THE WRIT

I. THE COURT LACKS JURISDICTION BECAUSE THE DECISION IS NOT A FINAL JUDGMENT UNDER 28 U.S.C. § 1257(a).

A. The Arizona Supreme Court's Decision in *Gila River III* is Not a Final Judgment Under 28 U.S.C. § 1257(a).

The Petitioners have failed to carry their burden of affirmatively establishing that the decision in *Gila River III* is a "final judgment" within the meaning of 28 U.S.C. § 1257(a). *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71 (1948). The Court's appellate jurisdiction to review a state-court decision under 28 U.S.C. § 1257(a) is limited to a "final judgment" rendered by the highest court of the state which rendered the decision. *Cox Broadcasting v. Cohn*, 420 U.S. 469, 476-477 (1975) (herein "*Cox*").

The "final judgment" rule has been interpreted by this Court "to preclude reviewability . . . where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). In *Radio Station WOW, supra*, this Court provided the rationale for the "final judgment" rule:

> This requirement has the support of considerations generally applicable to good judicial administration. It avoids the mischief of economic waste and of delayed justice. Only in very few situations, where

17. In *Gila River III* at 749-750, the Arizona Supreme Court held: "We similarly hold that once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right."

> intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction. This prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court. Here we are in the realm of potential conflict between the courts of two different governments.

Radio Station WOW at 124.

The Court in *Cox* recognized four categories of cases that constitute exceptions to the final judgment rule where state-court judgments are treated as final even though there are further proceedings to take place. None of these four categories apply, however, where there are other *federal questions* that must be decided in the further proceedings to take place. *Cox* at 477. This Court in *Cox* stated:

> In most, if not all, of the cases in these categories, these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date, and immediate rather than delayed review would be the best way to avoid. "the mischief of economic waste and of delayed justice," *Radio Station WOW, Inc. v. Johnson, supra* at 124, as well as precipitate interference with state litigation.

Cox at 477.

Phelps Dodge argues that only the fourth category of exceptions to the "final judgment" rule applies in this matter.[18] This Court has ruled that there may be an exception to the "final judgment" rule where the federal question has been finally decided by the state court, but: (1) there are further proceedings pending in which the party seeking review might prevail on the

18. Salt River Project did not argue that *Gila River III* falls within any of the four categories of exceptions to the "final judgment" rule. Respondents therefore presume that Salt River Project relies on the arguments made by Phelps Dodge.

merits on non-federal grounds, thus preventing review of the federal question by this Court; and (2) where reversal by this Court on the federal question would be preclusive of any further litigation in state court. The Court has held that it will only accept review in the forth category, if failure to do so would seriously erode federal policy. *Cox* at 482-483.

Here federal policy supports denial of Petitioners' Writs. *Gila River III* is a preliminary decision to guide the trial court. In Contested Case W1-203, proceeding below, the rights of the Gila River Reservation will be determined. The Trial Court will examine nearly a half million pages, executive orders, statutes, decrees, hydrologic reports to determine, in the first instance, whether that Reservation has a reserved water right; and if so, whether surface water is adequate to satisfy it; and if not, how much groundwater would be necessary to satisfy the right; and if so, to what extent, if any, pumping under state law would be limited to protect the federal purposes of that Reservation.

The same process is necessary for each federal reservation. It will be decades at the present pace before a final judgment in a factual setting will join the federal issues in a factual context. Meanwhile, *Gila River III* does not preclude Petitioners from exercising their alleged state rights to pump although they are on notice.

This fourth category of cases does not apply to *Gila River III* because there are other critically related federal questions that still must be decided in further trial court proceedings. The cases cited by Phelps Dodge that *Gila River III* is a final judgment, *Cox, supra*, and *Mercantile National Bank at Dallas v. Langdeau*, 371 U.S. 555 (1963), are therefore inapposite.

Moreover, *Gila River III* could not fall within the fourth category of cases because: (1) it is impossible that Petitioners could prevail on the merits on non-federal grounds, since they could only prevail on the merits if all of the related federal questions discussed herein were decided in their favor; and (2)

refusal by this Court to accept review now will not erode federal policy.

B. The Decision Is Interlocutory.

The Arizona Supreme Court has stated expressly that *Gila River III* is interlocutory. As discussed above, future trial court proceedings must decide dependent and critically related federal questions[19] *Gila River III* therefore does not fall within any of the four exceptions identified in *Cox*.

With respect to Issue 4, the federal question as to whether any particular federal reservation, Indian or otherwise, has a reserved right to groundwater, includes the related and dependent federal questions regarding the purposes of a reservation, and the quantification of that reservation's right to federally reserved waters:

> A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis. *See United States v. New Mexico*, 438 U.S. at 700.

Gila River III at 748.

Under *Gila River III*, the trial court will determine the purposes of a reservation, and quantify and prioritize each of a reservation's federal reserved water rights. Many reservations were established under multiple treaties, execute orders and

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19. *See Grays Harbor Logging Company v. Coats-Fordney Logging Company*, 243 U.S. 251 (1917); *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 122, 123-124, 127 (1945); *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62 (1948); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975) (herein "*Cox Broadcasting*"); *San Diego Gas & Electric v. City of San Diego*, 450 U.S. 621 (1981); *Flynt v. Ohio*, 451 U.S. 619 (1981); *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); and *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997).

parcels. Petitioners below have urged that each addition carries a separate federal purpose.

With respect to Issue 5, the *Gila River III* court decided that no federal reserved right holder is entitled to injunctive relief until after it establishes a reserved right to groundwater (Issue 4), and then only to the extent necessary to preserve the reservation's groundwater rights (Issue 5).

> In Part III we declined in the abstract to declare a standard for determining the purpose of a reservation. We here decline in the abstract to define how imminent a threat to a reservation's essential waters must be in order to warrant injunctive relief. The latter standard, like the former, should be grounded in the bedrock of the facts.

Gila River III at 750.

This will require a complex evaluation of the water supply, both surface and groundwater. The Court will determine the water supply which was available at the time each reservation parcel was established. It will evaluate the present supply to determine whether surface water is adequate. If not, it will evaluate complex questions related to the groundwater supply under or near the reservation. At that time, the trial court will structure the rules necessary to protect the federal purposes for the reservation. As in *Cappaert*, pumping off the reservation will be limited under *Gila River III* only to the extent required to protect the federal purpose.

A related but separate federal question included within Issue 5, not decided, but discussed in *Gila River III*, is whether the Arizona Supreme Court's definition of "subflow" (Interlocutory Issue No. 2 now pending before the Arizona Supreme Court for decision), will be broad enough to protect the surface water rights of federal reservations from depletion by pumping. *Gila River III* at 749.[20] Respondents allege that the regulation of

20. In *In re the General Adjudication of All Rights To Use Water in the Gila River Systems and Source*, 857 P.2d 1236 (1993), (Cont'd)

state groundwater pumping within the category of "subflow," as surface flow under the law of prior appropriation, will not be adequate to protect federal reserved surface water rights. State groundwater pumping of "subflow" to be defined by the Arizona Supreme Court in the pending Interlocutory Issue No. 2 Issue, will be treated as the appropriation of surface flow and will likely be assigned a priority date and diversion rate, and regulated accordingly under the doctrine of prior appropriation.

These critical federal questions demonstrate that *Gila River III* is not a final judgment under category 4 of *Cox*. Moreover, that category does not apply with respect to Issue 4, because it is impossible that Petitioners could prevail on the merits on non-federal grounds. The trial court would have to rule against Petitioners on all of the related federal questions discussed herein, if they are to prevail with respect to Issue 4.

Gila River III does not erode federal policy. It is consistent with the federal reserved water rights doctrine, as clearly shown by the Arizona Supreme Court's careful application of the prior decisions of this Court, including *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *Cappaert v. United States*, 426 U.S. 128 (1976); and *United States v. New Mexico*, 438 U.S. 696 (1978). The decision in *Gila River III* therefore does not erode federal policy, and would not be reviewable under the fourth category of exceptions to the "final judgment" rule, even if all other prerequisites for review were satisfied.

Interlocutory review by this Court now of *Gila River III*, violates both the substance of the "final judgment" rule, and the policies underlying such rule, because interlocutory review

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(Cont'd)

(Interlocutory Issue No. 2), the Arizona Supreme Court remanded the issue of "subflow," *i.e.*, whether a well pumping near a river depletes streamflow to the extent that it must be regulated as an appropriation of surface flow, to the trial court. The trial court on remand determined that a well pumping from the "younger alluvium" connected to a river is pumping "subflow." The trial court's decision was reviewed by the Arizona Supreme Court, and a final decision is pending.

now would substantially and needlessly interfere with Arizona's ongoing general stream adjudications, and in particular, the Gila River Indian Community's federal reserved water rights in Arizona in W1-203. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

II. THE COURT SHOULD NOT GRANT CERTIORARI BECAUSE THE *GILA RIVER III* DECISION IS ABSTRACT IN NATURE.

Gila River III is abstract in nature, as a matter of substantive law. This Court should not accept jurisdiction, even if the Court determined that the decision was a final judgment. *See Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947).

The *Gila River III* court explained that it was not imposing a standard upon the trial court for determining the purpose of any reservation, because such a standard is not well-suited to "abstract declaration and should instead emerge from testing in the solid. context of the facts." *Gila River III* at 748-750. Thus, the trial court in future proceedings involving the issue as to whether a particular federal reservation has a reserved right to groundwater, will be required to decide other related federal questions, including the standard for determining the purpose of any particular reservation, and if ". . . other waters are inadequate to accomplish the purpose of a reservation." *Gila River III* at 748.

The *Gila River III* court also followed this Court's holding in *United States v. New Mexico*, 438 U.S. 696 (1978) (herein "*New Mexico*"), and held that a reserved right to groundwater may only be found where "other waters" are inadequate to accomplish the purpose of a reservation. Assuming *arguendo* that the *Gila River III* decision is a final judgment, the Court should not grant review because the decision comes to this Court in a highly abstract form as acknowledged by the Arizona Supreme Court in its decision. *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947); and *Minnick v. California*

Department of Corrections, 452 U.S. 105 (1981). It has long been this Court's practice not to decide abstract issues of law.

Petitioners present no case or controversy. The Petitioners are essentially requesting that the Court render an advisory opinion on Issue 4, one of several related federal questions in *Gila River III*. This Court should decline discretionary certiorari review in this matter, where further Arizona state court proceedings will tender the related federal questions to this Court in clean-cut and concrete form, grounded in the bedrock of facts, after they have actually been decided and applied in the adjudication of a particular federal reservation's federally reserved water rights. *Gila River III* at 748-750; *Rescue Army v. Municipal Court of Los Angeles*, 331 U.S. 549 (1947); and *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981).

III. THE ARIZONA SUPREME COURT DECISION CONFORMS WITH THE PREVIOUS DECISIONS OF THIS COURT REGARDING FEDERAL RESERVED WATER RIGHTS.

A. The *Gila River III* Court's Holdings With Respect to Issue 4 and 5.

With respect to Issue 4, the *Gila River III* court held:

> Federal reserved rights extend to groundwater to the extent groundwater is necessary to accomplish the purpose of a reservation.

Gila River III at 751.

With respect to Issue 5, the *Gila River III* court held:

> Holders of federal reserved rights enjoy greater protection from groundwater pumping than do holders of state law to the extent that greater protection may be necessary to maintain sufficient water to accomplish the purpose of a reservation.

Gila River III at 751.

The *Gila River III* court specifically rejected all of the arguments that Petitioners make here that state law regarding

groundwater pumping is adequate to protect federal reserved water rights.

First, the Arizona Supreme Court stated that this Court has defined the federal reserved water rights doctrine as an exception to Congress' deference to state water law. *Gila River III* at 747. *See Cappaert*, 426 U.S. at 144 (holding that the Desert Land Act does not apply to water rights on federally reserved land. *See also United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). Petitioners therefore egregiously misstate the law when they argue in their Petitions that federal reserved rights are deferential to state water law.

Second, the Arizona Supreme Court in *Gila River III* also rejected Petitioners' arguments under *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), that state law is adequate to protect federal reserved water rights to groundwater, the court holding that if Arizona groundwater law applied to federal reservations, all overlying landowners would have an equal right to pump as much water as they can put to reasonable use, and all aquifers underlying federal reservations could be pumped dry by "off-reservation" pumping.

The court acknowledged in its decision that many aquifers underlying federal and Indian reservations have already been depleted by state groundwater pumpers.[21]

The *Gila River III* court correctly rejected Petitioners' argument that federal law should adopt the state rule of decision for the reason that it overlooks the fact that federal reserved water rights are by nature a federal preserve intended to continue in perpetuity, and they must fulfill the "future requirements" of

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21. The *Gila River III* court at 748 noted that "Within the Lower Gila River watershed [Gila River Indian Reservation], groundwater tables have been so lowered as to sever the connection between ground and surface water." The court also noted at p. 748 that "Some Indian reservations have been entirely "dewatered" by off-reservation pumping." citing *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 665-66 (1986).

federal and Indian reservations, citing *Winters*, *supra*, and *Arizona v. California*, *supra*:

> A theoretical equal right to pump groundwater in contrast to a reserved right, would not protect a federal reservation from a total future depletion of its underlying aquifer by off-reservation pumping.

Gila River III at 748.

The application of state groundwater law to federal reservations, even in a "nondiscriminatory" manner as argued by Petitioners, would nevertheless frustrate or defeat the federal purposes and objectives of federal reservations, since the groundwater underlying federal reservations would be pumped dry under the state rule of decision. *United States v. Little Lake Misere Land Co.*, 412 U.S. 580 (1973).

The federal reserved water rights doctrine must therefore be applied to groundwater for all federal reservations as a matter of federal law in order to protect and safeguard federal interests. *Cappaert*, *supra*.[22]

B. The *Gila River III* Court's Decision Follows This Court's Previous Decisions Regarding Federal Reserved Water Rights and Therefore Does Not Erode Federal Policy.

The *Gila River III* court cited the holdings of this Court in both *Winters* (federal reserved rights extend to surface water) and *Cappaert* (federal reserved surface water protected from depletion by state groundwater pumping),[23] as guideposts

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22. Issues 4 and 5 are inextricably related because Issue 5 protects the groundwater underlying federal reservations from being depleted.

23. In *Cappaert*, this Court held: "Thus, since the implied-reservation-of-water is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion if of surface or groundwater." *Cappaert* at 143. The Court held that reserved surface water at Devil's Hole which was part of the Death Valley National Monument was protected from depletion by state groundwater pumping to the extent necessary to satisfy one of the purposes of the reservation which was to preserve a unique species of fish.

providing the rational for their holding that federal reserved water rights may also extend to groundwater:

> While Cappaert bears most directly upon our discussion of issue 5 in Part IV of this opinion, we find it helpful to our resolution of the present issue [Issue 4] as well. That federal reserved right law declines to differentiate surface and groundwater — that it recognizes them as integral parts of a hydrologic cycle — when addressing the diversion of protected waters suggests that federal reserved rights law would similarly decline to differentiate surface and groundwater when identifying the water to be protected.

Gila River III at 747.

Thus, the Arizona Supreme Court applied and followed this Court's previous decisions regarding federal reserved water rights in *Winters, Cappaert and New Mexico. Gila River III* is therefore consistent with the federal substantive law and policies protecting federal reserved water rights as established by this Court.

C. The Decision Is Consistent With The Decisions of Other Federal Courts.

The Decision is consistent with the decisions of all federal courts which have ruled on the federal reserved rights to groundwater. While this Court has not yet ruled that federal reserved water rights extend to groundwater, some federal courts have.

The Federal District Court in San Carlos expressly ruled on the Apache Tribes' concern that Arizona would not follow federal law concerning the reserved right to groundwater. *Matter of Determination of Conflicting Rights To The Use of Water From The Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (1980), *rev'd on other grounds*, 668 F.2d 1093 (1982), *rev'd*, 463 U.S. 545 (1983), *vacated* 721 F.2d 1187 (1983) (action

stayed pending conclusion of state court proceeding). The Court cited *Cappaert* as the authority for its ruling:

> The Supreme Court in *Cappaert* further stated that the "United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." 426 U.S. at 143, 96 S.Ct. At 2071.
>
> Thus, the State proceedings will determine federal reserved water rights (including federal reserved rights to percolating groundwater) and rights to water appropriable under State law.
>
> Those rights which are state created will be determined by state law and Federal law will be applied to determine those rights which derive from Federal law.

484 F. Supp. at 784.

Thus, the U.S. District Court of Arizona held in this case that because Arizona general stream adjudications would adjudicate the federal reserved water rights of Indian tribes to both surface and groundwater, the state proceedings qualified as a McCarran Amendment proceeding.

In *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 699-700 (1986), the U.S. Court of Claims expressly held that groundwater under the Gila River Indian Reservation was impliedly reserved for the Gila River Indian Community under the federal reserved rights doctrine, citing *Winters, Arizona v. California*, and *Cappaert, supra*, as authority.

In *Tweedy v. Texas Company*, 286 F. Supp. 383, 385 (Mont. 1968), the U.S. District Court of Montana acknowledged that while the *Winters* case dealt only with surface water, the same logic which led this Court in *Winters* to hold that surface waters had been reserved, would also apply to groundwater:

> The land was arid — water would make it more useful, and whether the water were found on the

> surface of the land or under it should make no difference.

In *Park Center Water District v. United States*, 781 P.2d 90, 95 (Colo. 1989), *cert. den.*, 494 U.S. 1079 (1990), the Supreme Court of Colorado assumed without deciding, that federal reserved water rights apply to groundwater in the same way as it does to surface water, citing *Cappaert*.

In *State of Nevada v. United States*, 165 F. Supp. 600 (D. Nev. 1958) the federal court ruled that the federal government had the right under the holding in *Federal Power Comm'n. v. Oregon*, 349 U.S. 435 (1955), to make full use of all underground or percolating waters developed in its own wells on federal reserved land, independent of state law or procedures, and was therefore not required to comply with state law or procedures to use its underground waters.

The Ninth Circuit in *United States v. Cappaert*, 508 F.2d 313, 317 (9th Cir. 1974) also held that Federal reserved rights extend to both surface water and groundwater:

> **Two cases in the Ninth Circuit approved the application of the doctrine of implied reservation of groundwater when water was needed to accomplish the purpose of the reservation.** *Neveda ex rel. Shamberger v. United States,* 165 F.Supp. 600 (D. Nev. 1958), aff'd on other grounds, 279 F.2d 699 (9th Cir. 1960); *Tweedy v. Texas Co.*, 286 F.Supp. 383 (D. Mont. 1968).
>
> **In our view the United States may reserve not only surface water, but also underground water.**

(Emphasis added).

Petitioners' argument that this Court should treat *Gila River III* as a final judgment under the fourth category of exceptions to the "final judgment" rule under *Cox Broadcasting v. Cohn*, 420 U.S. 469, 476-477 (1975) (herein "*Cox*"), because it is inconsistent with and will erode federal policy, is therefore erroneous.

D. The Gila River III Court Correctly Decided Issue 4.

The Court has long recognized the reality that groundwater and stream flow are connected. It is not an impermissible leap of faith to find that "groundwater and groundwater" are connected. In *Arizona v. California*, all withdrawals of water in the Upper Basin, from surface flow or from wells, is counted against the Upper Basin share of the Colorado River. The Court also ruled that all "underground sources" were to be counted against New Mexico's share of the Gila River under the equitable apportionment between New Mexico and Arizona. *Arizona v. California*, 376 U.S. 340, 347, 348 (1964). New Mexico water users were enjoined by the Court from withdrawing water from underground sources in the Gila Basin in New Mexico, with certain exceptions. *Id.* at 347, 348, 349. It further ruled that under those limited exceptions, pumping could be enjoined when it "is adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree." *Id.* at 350. *See also Cappaert* at 142; *Kansas v. Colorado*, 514 U.S. 673 (1995) (Post Compact pumping in Colorado has caused material depletion of usable state line flows of the Arkansas River); *Nebraska v. Wyoming and Colorado*, 515 U.S. 1 (1995) (Nebraska would be permitted to allege that increased groundwater pumping within Wyoming threatened substantial depletion of the North Platte River's natural flow.)

Issues 4 and 5 are inextricably intertwined because *Cappaert* was followed by the *Gila River III* court in its holding that federal reserved right to groundwater may be protected from depletion by state groundwater pumping. The need to protect federal groundwater from depletion, provides the logic and rationale for the *Gila River III* court's holding, that federal reserved water rights extend to groundwater to the extent necessary to accomplish the purpose of a reservation.[24]

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24. The Arizona Supreme Court found that even if Arizona state law were applied in a nondiscriminatory manner among state and federal interests, groundwater underlying federal reservations could be totally depleted, as has already happened to some federal and Indian

(Cont'd)

IV. CONFLICTS WITH OTHER CASES DO NOT EXIST TO PROVIDE REASON TO GRANT CERTIORARI.

There is no reason to grant certiorari under Supreme Court Rule 10.

Petitioners argue that there is a conflict between two state courts of last resort regarding the same important federal question.[25] This Court did accept jurisdiction in Wyoming in *Wyoming v. United States*, 488 U.S. 1040 (1989) (herein "*Wyoming*"), to review the federal question of the extent of Indian federal reserved water rights under the "practicably irrigable acreage" standard adopted by this Court in *Arizona v. California*, 373 U.S. 546 (1963). However, the Wyoming state court decision, *In re: the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), was clearly a final judgment within the meaning of 28 U.S.C. § 1257(a). It was not an interlocutory judgment as argued by Phelps Dodge in its Petition at p. 13 because the trial court had adjudicated all of the federal questions and the reserved water rights of the Wind River Indian Reservation.[26]

(Cont'd)

reservations in Arizona. *Gila River III* at 748. It is the federal concern and objective to protect against the depletion of the federal interest, here groundwater underlying federal reservations (Issue 5), that predetermines the federal decision that the federal reserved rights doctrine applies to groundwater (Issue 4).

25. The Petitioners cite the dissenting opinion in *Confederated Salish and Kootenai Tribes v. Clinch*, 992 P.2d 244 (Mont. 1999) (herein "*Clinch*"), for the proposition that there is a conflict between the Arizona and Wyoming state courts of last resort regarding whether a federal reserved right to groundwater exists.

26. This Court has held that the designation given the judgment by state practice is not controlling as to finality. *Richfield Oil Corp. v. State Board*, 329 U.S. 69 (1946). However, *Gila River III* is interlocutory, because further trial court proceedings are necessary to apply the court's holding regarding Issue 4, within the context of the adjudication of a particular federal reservation where other related federal questions must also be decided.

In *Clinch*, the Montana Supreme Court upheld its prior decision in *In the Matter of the Application for Beneficial Water Use Permit Nos. 66459-76L, Ciotti, et al.*, 923 P.2d 1073 (Mont. 1996), that the Montana Department of Natural Resources and Conservation has no authority to issue any water permits on the Flathead Indian Reservation until the Tribes' reserved water rights are quantified. The Montana cases do not address the issue of whether the Tribes have a federal reserved right to groundwater. The Montana cases held that there is a difference between state appropriative rights and federal reserved rights because federal reserved rights are governed by federal law, and are established by references to the purposes of a reservation.

In *Gila River III*, unlike Big Horn, there has been no adjudication of any federal reservation's reserved water right, Indian or otherwise. The argument by Phelps Dodge that since the decision in the Wyoming state court decision was interlocutory, but treated as a final judgment that this Court should also treat *Gila River III* as a final judgment, is flawed.

In the present context of the Arizona adjudications, it appears that the first Indian water rights to be adjudicated will be those of the Gila River Reservation in Contested Case W1-203. The Special Master in the Gila River adjudication has set the briefing schedule to begin adjudicating the federal reserved water rights of the Gila River Indian Community. *See* Contested Case No W1-203, "*In re the Water Rights of the Gila River Indian Community.*"

As with the Wind River Indian Reservation in the Wyoming, Issue 4, and all other dependent and related federal questions relating to whether the Gila River Indian Reservation has a reserved water right to groundwater, will be adjudicated in W1-203. If the Arizona Supreme Court then reviews the trial court judgment, and issues a decision, this Court might then have appellate jurisdiction to review Issue 4 as a final judgment under 28 U.S.C. § 1257(a).

CONCLUSION

These Petitioners initiated the Arizona adjudications. They wrote the statues and represented to the Court, the Arizona Supreme Court and these Respondents that the Arizona adjudication would be comprehensive. In San Carlos the same Petitioners told the Court:

> There is little dispute over the comprehensiveness of Arizona's statutory procedure for the general adjudication of conflicting claims to water. (fn omitted) Under that procedure, each owner of land in the watershed under adjudication is identified and personally served with process, and each water right is determined in a decree binding on all water claimants within the watershed — which, of course, is precisely the procedure required by the McCarran.

Petitioners' Reply Brief in No. 81-2147, p. 10. They should not now be heard to say that they did not mean groundwater necessary to the purposes of a federal reservation, or that it is too burdensome on state claimants to participate. It is burdensome on the Tribes . The Apache Tribes urged the Court to protect them from the State proceedings in *San Carlos*.

The Supreme Court of Arizona addressed these concerns of Petitions in *Gila River III*. It correctly determined that "for federal law, the question is one of hydrology, not compartmentalization." *Id.* at 751. It found that "the overarching purpose of the general stream adjudication statute is to provide the finality and certainty that can only be achieved through determination of all claims to water within the basin." *Id.* at 751.

Petitioners should not now be heard to say that although they knew that they could not defeat the federal purposes of an Indian reservation by surface diversions under *Winters*, they nevertheless could do it with their pumps.

The Arizona Supreme Court reminded these Petitioners that "there long has loomed the need — sometimes noted, sometimes wished away — for those same interests also to accommodate

themselves to the water claims of the vast federal land holdings that surround them." *See Gila River I*, 697 P.2d at 663. *Gila River III* at 750.

These Petitioners must abide by the proceedings they initiated. Although burdensome for all, at this point "the best way out is always through." *Gila River III* at 750.

The Court should deny the certiorari petitions because the *Gila River III* decision is not a "final judgment" within the meaning of 28 U.S.C. § 1257(a); and because the decision is abstract in nature not warranting review at this time.

Respectfully submitted,

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Nos. 99-1388 and 99-1389

In The

Supreme Court of the United States

PHELPS DODGE CORPORATION,

Petitioners,

v.

THE UNITED STATES,

Respondents.

SALT RIVER VALLEY WATER USERS' ASSOCIATION,

Petitioners,

v.

THE UNITED STATES,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Arizona

MOTION TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, AND NORTHWEST MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the implied federal reserved water rights doctrine applies to groundwater?

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION, MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, AND NORTHWEST MINING ASSOCIATION

Mountain States Legal Foundation ("MSLF") respectfully petitions this Court for leave to file the annexed brief *amici curiae* pursuant to Supreme Court Rule 37.2(b). Written consent of all the parties was sought pursuant to Supreme Court Rule 37.2(a).[1] The Solicitor General of the United States has given his consent to this *amici* brief. However, the San Carlos Apache Tribe, the Tonto Apache Tribe, the Yavapai Apache Indian Tribe, Camp Verde Reservation, and the San Juan Southern Paiute Tribe do not consent to the filing of this *amici* brief, and the Hopi Tribe objects to the filing of this brief because they were not provided with a copy of the brief by April 10, 2000. All parties did not respond within the time allowed.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Mountain States Legal Foundation is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited government, and the free enterprise system. MSLF's members include individuals and businesses from every state in the Union, including Arizona and other western states. Many of MSLF's members own

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[1] Copies of the consent letters received have been filed with the Clerk of the Court.

water rights in Arizona and other western states, upon which their communities and livelihood are dependent.

Since its establishment in 1977, MSLF has been active in litigation to preserve state water law principles. *See Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985); *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981). MSLF is currently representing the Cities of Salmon and Challis, Idaho, in water rights litigation before the Supreme Court of Idaho involving federal reserved water rights. *See In Re SRBA, Case No. 39576 – Wilderness Reserved Claims (Potlatch Corporation, et al. v. United States)*, 1999 Opinion No. 113 (Idaho October 1, 1999), *reh'g granted*, Nov. 30, 1999.

Montana Farm Bureau Federation ("MFBF") is a voluntary, non-profit, general farm and ranch organization incorporated under the laws of the State of Montana. MFBF represents the economic, educational, and social interests of more than 8,200 member families throughout the State of Montana. Twenty percent of the commercial farmers and ranchers in the State of Montana are members of MFBF. Many MFBF members hold state water rights for farming and ranching purposes and their local communities are dependent upon state water rights as well. MFBF is concerned about any potential water law precedent that infringes upon state control of water resources.

Idaho Farm Bureau Federation ("IFBF") is a voluntary, nongovernmental, nonpartisan organization of farm and ranch families incorporated under the laws of the State of Idaho. IFBF represents the economic, educational,

and social interests of its 12,000 farmer members, representing more than half the farms in the State of Idaho. Many IFBF members hold state water rights for farming and ranching purposes and their local communities are dependent upon state water rights as well. IFBF is concerned about any potential water law precedent that infringes upon state control of water resources.

Northwest Mining Association ("NWMA") is a nonprofit, nonpartisan trade association organized under the laws of the State of Washington, with its principal place of business in Spokane, Washington. NWMA was founded in 1895 by miners from the states of Idaho, Montana, and Washington, as well as several Canadian provinces. NWMA currently has 2,500 members residing in 42 states and 8 Canadian provinces. NWMA's purposes are: (1) to support and advance mineral resource and related industries; (2) to represent and inform members on technical, legislative, and regulatory issues; (3) to provide for the dissemination of educational material related to mining; and (4) to foster and promote economic opportunity and environmentally responsible mining. The mining industry and NWMA's members are closely tied to water rights and water law issues, as water is essential for mining activities. In fact, western water law originated in the mining camps of the west.

For the foregoing reasons, Mountain States Legal Foundation, Montana Farm Bureau Federation, Idaho

Farm Bureau Federation, and Northwest Mining Association request that this motion to file the annexed brief *amici curiae* be granted.

DATED: May 5, 2000

Respectfully submitted,

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Mountain States Legal Foundation respectfully submits this brief *amici curiae* on behalf of itself, Montana Farm Bureau Federation, Idaho Farm Bureau Federation, and Northwest Mining Association in support of Petitioners.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

The identities and interests of *amici curiae* are set forth in the preceeding motion and are adopted herein.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amici hereby adopt Petitioners' description of the opinions below, statement of jurisdiction, and statement of the case.

[1] In compliance with Supreme Court Rule 37.6, *amici curiae* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici curiae* and their members, made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should grant this Petition for Certiorari because the decision of the Arizona Supreme Court below conflicts with decisions of this Court on the implied federal reserved water rights doctrine. The cases of this Court recognize Congress' long-standing deference to state water allocation principles. However, the Arizona Supreme Court's decision affords no deference to state water law. In addition, the implied federal reserved water rights doctrine was established by this Court as a very narrow exception to state water allocation principles. The Arizona Supreme Court's decision impermissibly and unnecessarily broadens the scope of this doctrine. This Court should grant Certiorari in order to address this conflict.

ARGUMENT

I. THE DECISION OF THE ARIZONA SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT ON FEDERAL RESERVED WATER RIGHTS.

A. This Court Has Always Recognized Congress' Long-standing Deference To State Water Allocation Principles.

During the mid-nineteenth century, in an effort to settle and develop the west, Congress gave up control of western water allocation. Congress' long-standing policy of deference to state water allocation principles was confirmed expressly when Congress recognized and protected state water rights in Section 9 of the Mining Act of

1866, now codified at 43 U.S.C. § 661.[2] *Atchison v. Peterson*, 20 Wall. 507, 513 (1874); *Jennison v. Kirk*, 98 U.S. 453, 458 (1879) ("These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them.") Thus, historically, Congress deferred to state water law in recognition of the sheer value of property rights acquired under state water rights systems.

Subsequently, in passing the Desert Lands Act of 1877, now codified at 43 U.S.C. § 321, Congress severed the remaining unappropriated waters of the United States from the federal public lands, reserving the waters for the use of the public "under the laws of the states and territories." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 162 (1935). Consequently, after 1877, the right to use water was to be determined according to state law.

Other laws in which Congress rejected a uniform federal water law to defer to state laws governing water rights include the Townsite Act, which provided for the establishment of townsites on federal lands, 43 U.S.C.

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[2] Section 9 of the Mining Act of 1866 provided:

> That whenever, by priority of possession, rights to use of water for mining, agriculture, manufacturing or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested right shall be maintained and protected in same. . . . 43 U.S.C. § 661.

This provision was preserved from repeal in 1872 and remains in effect as part of the General Mining Law.

§§ 711 *et seq.* (1867) (repealed); the Organic Administration Act of 1897, 16 U.S.C. § 418 (repealed), regarding administration of the national forest system; and the 1902 Reclamation Act, 43 U.S.C. §§ 371 *et seq.*, which assisted further water development in the western states.[3] In fact, the legislative history of the Reclamation Act makes clear that Congress considered adopting a uniform federal water law, but rejected such a notion because of the conflict and injustice that would result from displacing valuable rights obtained under state water laws.

In addition, this Court in *United States v. New Mexico*, 438 U.S. 696, 702 n.5 (1978), referred to "37 statutes in which Congress has expressly recognized the importance of deferring to state water law, from the Mining Act of 1866, § 9, 14 Stat. 253, to the Act of Aug. 28, 1958, § 202, 72 Stat. 1059, stating Congress' policy to 'recognize and protect the rights and interests of the State of Texas in determining the development of the watersheds of the rivers . . . and its interests and rights in water utilization and control.' "

This Court has since recognized a few exceptions to this general federal policy of deference to state water law. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899) (recognizing Commerce Clause authority to preserve navigability and water flows bordering federal

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[3] The Reclamation Act expressly provided that it was not to be construed to "in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder" and directed the Secretary of the Interior to "proceed in conformity with such laws." 43 U.S.C. § 383.

property); *Winters v. United States*, 207 U.S. 565 (1908) (recognizing implied federal reservation of water for Indian reservation).

For many years, *Winters* was seen as establishing a special rule applicable only to Indian reservations. This understanding was reinforced in *California Oregon Power*, 295 U.S. at 163-164, in which this Court praised the prior appropriation doctrine as essential to "the future growth and well being of the entire region" of western states.

Following the *California Oregon Power* decision, federal and state agencies and private appropriators all assumed that federal reserved water rights applied only to Indian reservations. *United States v. New Mexico*, 438 U.S. at 703 n.7. Although this assumption came to an end with *Federal Power Commission v. Oregon* (*"Pelton Dam"*), 349 U.S. 435, 448 (1955), in which the "public lands" of *California Oregon Power* were defined to exclude lands reserved for a specific purpose, this Court has more recently clarified that the federal reserved water rights doctrine is indeed a narrow doctrine.

In *United States v. New Mexico*, 438 U.S. at 701-702, 715, this Court emphasized Congress' historical policy of deferring to state water law and the narrow exception that the reserved rights doctrine made to that policy. This Court made clear that that federal policy is, and historically has been, to defer to state water law except where doing so would "entirely defeat[]" the purposes of a federal reservation. *Id.* at 700. Given the history of congressional deference to state water law and the absence of a federal common law with respect to water rights, the federal reserved water rights doctrine was never

intended to wholly supplant state water law. Rather, the doctrine is simply a limited mechanism for establishing federal water rights within the existing state system when absolutely necessary. The Arizona Supreme Court failed to heed these historical principles when it held that the implied federal reserved water rights doctrine extends to groundwater. This Court should grant this petition to resolve the conflict between the holdings of this Court and the holding of the Arizona Supreme Court.

B. This Court Established The Federal Reserved Water Rights Doctrine As A Very Narrow Exception To State Water Allocation Principles.

This Court first established the federal reserved water rights doctrine in *Winters v. United States*, 207 U.S. 654 (1908). This Court recognized that the lands reserved to the Indians were "arid, and, without irrigation, were practically valueless." *Id.* at 576. Because the treaty, or contract, between the federal government and the Indians had been completely silent with regard to water rights, this Court was forced to deal with the "conflict of implications" with regard to water rights under the agreement: reserved water rights for the reservation or the cession of water rights necessary for life by the Indians. *Id.* This Court had to decide which of the "two inferences" was intended by the agreement, opting for the one that "would support the purpose of the agreement" rather than "impair or defeat it," having no desire to see the Indians' ability to live on the reservation "destroyed . . . leaving them a barren waste." *Id.* at 577. Given the federal government's special trust relationship with Indian Tribes, *United States v. Kagama*, 118 U.S. 375, 384-385

(1886), this Court was certainly not inclined to decide that Congress had intended to set aside the reservation for the Indians without the water "necessary to sustain life." *Arizona v. California*, 373 U.S. 546, 598-599 (1963). In the context of federal reserved water rights, "Indian treaties should be interpreted generously and liberally in favor of the Indians." *In Re Rights To Use Water In Big Horn River System*, 753 P.2d 76, 96 (Wyo. 1988) (internal citations omitted).

The federal reserved water right implied in *Winters* was not an automatic "superpriority" in state-regulated waters to be invoked whenever the United States desires more water for use upon federal reserved lands. Rather, the doctrine constitutes a narrow exception to state water law, to be applied only when there is a serious "conflict of implications" going to the very purpose for which the lands were reserved. *Winters*, 207 U.S. at 577; *New Mexico*, 438 U.S. at 700-702.

The Arizona Supreme Court relied heavily on *Cappaert v. United States*, 426 U.S. 128 (1976), in determining that the implied federal reserved water rights doctrine applies to groundwater. However, *Cappaert* is inapposite on this issue. In *Cappaert*, this Court implied a federal reserved water right in the surface water of the pool inside Devil's Hole, part of a National Monument. *Id.* at 142. Although the reserved right affected the ability of the Cappaerts to pump groundwater within 2.5 miles of Devil's Hole, the reserved right was in the surface water in the Hole, not groundwater. *Id.* This Court specifically held that the Cappaerts had not acquired any appropriation rights under state law as of 1952 when Devil's Hole was reserved and the United States' rights vested. *Id.* at

139 n.5, 144 n.9. Therefore, the federal reserved water rights were superior to those of the Cappaerts. *Id.* at 143 n.8.

Thus, in holding that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater," this Court was doing nothing more than reaffirming the non-novel proposition that senior water rights trump junior rights under state law.[4] *Id.* at 143. In fact, this Court acknowledged that the Desert Land Act and its predecessors "provided that water rights vested under state law or custom are protected." *Id.* at 143 n.8.

The question presented in this case was specifically left open in *Cappaert*: "No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." *Cappaert*, 426 U.S. at 142. This Court went on to hold that the water in the pool was surface water, foregoing the need to address the groundwater question. *Id.*; *Big Horn River System*, 753 P.2d at 99 (acknowledging dearth of cases applying reserved rights doctrine to groundwater and recognizing that this Court did not do so in *Cappaert*). This Court should grant these Petitions in order to address this very question which was left open in *Cappaert*.

The federal reserved water rights doctrine is a judicial fiction created nearly a century ago to deal with a

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[4] Unlike Arizona, the State of Nevada, in which Devil's Hole is located, applies the law of prior appropriation to both surface and groundwater. *Cappaert*, 426 U.S. at 142.

perceived oversight of Congress and the Indians in establishing Indian reservations. *Winters*, 207 U.S. at 576. Not only has the doctrine outlived its usefulness, but extensions of the doctrine will only further upset 150 years of western water law and destroy investment-backed expectations of thousands of western water users.

The problems of arid lands and limited water resources are obstacles for all western landowners and users, not merely the federal government. Rights to use of these limited water resources must be obtained by the federal government under the same rules applicable to others whenever possible. Every extension of the reserved water rights doctrine defeats the uniformity and consistency achieved by state control of water rights, leaving instead uncertainty, robbed expectations, and stymied development in western communities. "In the arid parts of the West . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States." *New Mexico*, 438 U.S. at 699. The Arizona Supreme Court failed to acknowledge the original design of the implied federal reserved water rights doctrine as a very narrow exception to state water allocation principles when it held that the doctrine extends to groundwater.

This Court should return to the narrow reading of the federal reserved water rights doctrine embodied in *Winters*. Federal reserved rights should be found only where the essential purpose of a particular reservation would be defeated entirely because water rights obtained under state law would be virtually meaningless. In *Winters*,

upon acquiring reservation lands from the federal government, the Indians had reserved no rights in the water flows through the reservation for irrigation and similar purposes necessary to sustain life on the land. *Winters*, 207 U.S. at 576. As the water had been fully appropriated by others at the time of this Court's decision, leaving the Indians with no rights to use the water flowing through their reservation, the reservation land was rendered unlivable. *Id.* This is the rare type of situation that may warrant federal reserved water rights. The importance of maintaining state control over water rights in all other situations, as evidenced by Congress' consistent deferral to state water rights in federal matters, counsels a reaffirmation of the federal reserved water rights doctrine as a narrow doctrine, applicable only when a meaningful water right – unobtainable under state law – is necessary to avoid the complete failure of Congress' essential purpose and intent in reserving the land. This Court should grant these Petitions in order to reaffirm the implied federal reserved water rights doctrine as a very narrow exception to state water allocation principles.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court grant the Petitions for *Writ of Certiorari*.

Respectfully submitted by:

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In The

Supreme Court of the United States

SALT RIVER VALLEY WATER USERS' ASSOCIATION and SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioners,

v.

THE UNITED STATES, THE SAN CARLOS APACHE TRIBE, THE TONTO APACHE TRIBE, THE YAVAPAI-APACHE NATION, THE HOPI TRIBE, THE NAVAJO NATION, THE SAN JUAN SOUTHERN PAIUTE TRIBE, THE GILA RIVER INDIAN COMMUNITY, and SILAS KISTO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENTAL STATUTORY PROVISIONS INVOLVED IN THE CASE

1. Arizona Revised Statutes (A.R.S.) § 45-401 provides, in pertinent part:

> A. The legislature finds that the people of Arizona are dependent in whole or in part upon groundwater basins for their water supply and that in many basins and sub-basins withdrawal is greatly in excess of the safe annual yield and that this is threatening to destroy the economy of certain areas of this state and is threatening to do substantial injury to the general economy of this state and its citizens. The legislature further finds that it is in the best interest of the general economy and welfare of this state and its citizens that the legislature evoke its police power to prescribe which uses of groundwater are most beneficial and economically effective.
>
> B. It is therefore declared to be the public policy of this state that in the interest of protecting and stabilizing the general economy and welfare of this state and its citizens it is necessary to conserve, protect and allocate the use of groundwater resources of the state and to provide a framework for the comprehensive management and regulation of the withdrawal, transportation, use, conservation and conveyance of rights to use groundwater in this state.

2. A.R.S. § 45-411 provides, in pertinent part:

> A. Four initial active management areas are established on the effective date of this section. The four initial active management areas are:
>
> 1. The Tucson active management area . . .

2. The Phoenix active management area . . .

3. The Prescott active management area . . .

4. The Pinal active management area . . .

3. A.R.S. § 45-451 provides, in pertinent part:

A. In an active management area, a person may:

1. Withdraw and use groundwater only in accordance with the provisions of articles 5 through 12 of this chapter.

STATEMENT OF THE CASE

I. HISTORY OF ARIZONA GROUNDWATER LAW

In *Maricopa County Municipal Water Conservation District v. Southwest Cotton Co.*, 39 Ariz. 65, 4 P.2d 369 (1931), the Arizona Supreme Court addressed the issue of underground water. The Arizona Court drew a distinction between subflow, which it held to be appropriable under Arizona's prior appropriation laws, and percolating water, which it held not to be appropriable. The Court did not, however, provide a definition of or distinction between subflow and percolating waters.

The Arizona Court considered and rejected one set of definitions of subflow and percolating water in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993) (*"Gila River II"*). In that decision, the Arizona Court acknowledged that this bifurcated system of water

rights – surface vs. groundwater – was not hydrologically sound.

> As scientific knowledge progressed, most states revised their water laws to provide for unitary management of hydraulically connected underground and surface water. Arizona, however, did not, and continues to adhere to a bifurcated system of water rights, with compelling implications for general stream adjudications.

175 Ariz. at 386, 857 P.2d at 1240.

The Arizona Court went on to note: "[W]e recognize that the line between surface and groundwater drawn by the Southwest Cotton court and reaffirmed by this court today is, to some extent, artificial and fluid." 175 Ariz. at 392, 857 P.2d at 1246.

The terms *subflow* and *percolating water,* for purposes of Arizona's bifurcated system, were again defined by the trial court and have again been taken to the Arizona Supreme Court on interlocutory review. The Arizona Court has received briefs and, in December of 1999, heard oral arguments. The parties await that decision.

In 1948, the Arizona Legislature adopted the Groundwater Act, which authorized the creation of critical groundwater areas. In 1952, in *Bristor v. Cheatham,* 73 Ariz. 228, 240 P.2d 185 ("*Bristor I*"), the Arizona Supreme Court reversed *Southwest Cotton* and determined that percolating groundwater was appropriable. Upon rehearing, following a change in the composition of the court, the Arizona Supreme Court reversed *Bristor I* and readopted

the *Southwest Cotton* rule on non-appropriation of percolating groundwater. *Bristor v. Cheatham*, 75 Ariz. 227, 255 P.2d 173 (1953) ("*Bristor II*").

In 1980, the Arizona Legislature enacted the Groundwater Management Act and repealed the 1948 Groundwater Act. The Groundwater Management Act created active management areas ("AMAs") and irrigation non-expansion areas. The 1980 Groundwater Management Act was ruled constitutional in *Town of Chino Valley v. City of Phoenix*, 131 Ariz. 78, 638 P.2d 1324 (1981) ("*Chino Valley II*"). Therein, the Arizona Supreme Court held that "there is no right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and that the right of the owner of the overlying land is simply to the usufruct of the water." 131 Ariz. at 82, 638 P.2d at 1328.

In *Cherry v. Steiner*, 543 F. Supp. 1270, 1280 (1982), the United States District Court examined the extent of the Groundwater Management Act's coverage.

> It established four AMA's, which account for 69 percent of the State's groundwater overdraft and 80 percent of the State's population. The three AMA's with safe yield goals account for 45 percent of the overdraft and 77 percent of the population in Arizona. The Arizona Department of Economic Security has forecasted that the State's population will explode most profoundly in the area encompassed by the Phoenix, Tucson and Prescott AMA's.

In *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 743-744 (1999) ("*Gila River III*"), the Arizona Court further

explained its understanding of the scientific, real-world errors in Arizona's water law:

> Yet the notion of subflow is an artifice, as we acknowledged in Gila River II, that rests on a hydrological misconception. [Citation omitted.] To pump well water from "lands under or immediately adjacent to a stream" is not, we now know, the only pumping that may significantly diminish surface flow. The hydrological connection of groundwater and surface water is sometimes such that groundwater pumped more distantly within an aquifer may have comparable effect.
>
> * * *
>
> Conforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface waters and undertaken unitary management of water supplies.
>
> * * *
>
> A subflow standard, once it has been established, will serve to identify well-users who pump water subject to prior appropriation. But this adjudication is not limited to water subject to prior appropriation; it extends also to water subject to claims based on federal law. An adjudication such as this cannot achieve its comprehensive purposes without quantifying and prioritizing federal, as well as state law, claims.

II. HISTORY OF THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

In 1919, the Arizona Legislature adopted a procedure for the determination of conflicting water rights, which was amended in 1928 and 1939. *See* A.R.S. §§ 45-231 through 45-245 (repealed 1979). That procedure was conducted before the Arizona State Land Department in an administrative hearing, was limited to prior appropriation water rights, involved the rights of streams or water supplies but not entire river systems and sources, and did not address federal reserved rights.

General Water-Rights Adjudication in Arizona: Yesterday, Today and Tomorrow, 27 Ariz. Law Rev. 709 n. 2, 1985, sets forth the early history of Arizona's general water adjudications:

> On April 26, 1974, the Salt River Valley Water Users' Association (SRVWUA), invoking Arizona's statutory stream adjudication procedure, filed a petition with the Arizona State Land Department to determine conflicting rights to the use of water in the Salt River above Granite Reef Dam, east of Phoenix and excluding the Verde River. SRVWUA filed a similar petition for the Verde River and its tributaries on February 28, 1976. On February 17, 1978, Phelps Dodge Corporation filed two petitions with the State Land Department: one determining the conflicting rights to the Gila River, and the other determining the conflicting rights to the Little Colorado River.

The Arizona Supreme Court further described the history of these general water adjudications in *United States v.*

Superior Court of Arizona, 144 Ariz. 265, 270, 697 P.2d 658, 663 (1985):

> In 1979 the [Arizona State Land] Department advised various claimants of the pending petition and required that claims be filed pursuant to A.R.S. Section 45-232. Petitioners [San Carlos Apache Tribe, Tonto Apache Tribe, and the United States] were among the claimants so notified. Later that year several Indian tribes, including the petitioners, filed actions in the United States District Court for the District of Arizona, seeking a declaration of rights with respect to the issues raised in the proceeding before the Arizona State Land Department. Within two months after that filing, the state legislature repealed the former act (Sections 45-231 to 45-245) and replaced it with the present statute (article 6, Title 45, Arizona Revised Statutes, consisting of Sections 45-251 to 45-260 and entitled "General Adjudication of Water Rights").

A number of Arizona Indian Tribes brought actions in District Court, requesting relief from state administrative water adjudications. The parties to *In the Matter of the Determination of Conflicting Rights to the Use of Water From the Salt River Above Granite Reef Dam*, 484 F. Supp. 778 (1980), included the Salt River Valley Water Users' Association, the Phelps Dodge Corporation, the State of Arizona, the Gila River Indian Community, the San Carlos Apache Tribe, and numerous other Arizona Indian Tribes.

On January 18, 1980, the District Court remanded the actions to state court or dismissed them, without prejudice, based on the applicability of the McCarran Amendment. 43 United States Code (U.S.C.) § 666. The tribes had

contended that the State adjudication was not a McCarran Amendment proceeding because the Arizona water rights determination law deliberately excluded non-Indian uses of percolating groundwater. After an analysis of the *Winters* Doctrine, *Winters v. United States*, 207 U.S. 564, 28 S. Ct. 207, 52 L. Ed. 340 (1908), and the applicable Arizona state law, the District Court concluded:

> Section 45-251(5), Arizona Revised Statutes, which effectively sets forth the scope of the State proceedings, defines the phrase "river system and source" as "(A)ll water appropriable under (A.R.S.) Section 45-101 and all water subject to claims based upon federal law."
>
> Thus, the State proceedings will determine federal reserved rights (including federal reserved rights to percolating groundwater) and rights to water appropriable under State law. The only water rights excluded from the State proceeding are those rights to percolating groundwater arising solely under existing Arizona case law.

Granite Reef Dam, 484 F. Supp. at 784.

In re the General Adjudication of All Rights to Use Water in the Gila River System and Source has now been in litigation for over twenty years. The current opinion, ("*Gila River III*"), reflects the sixth appearance of this general stream adjudication before the Arizona Supreme Court. In this action, the Arizona Court answered two interlocutory questions:

> Do federal reserved water rights extend to groundwater (underground water) that is not subject to prior appropriation under Arizona Law? (Interlocutory Issue 4)

> Are federal reserved rights holders entitled to greater protection from groundwater pumping than are water users who hold only state law rights? (Interlocutory Issue 5)

The Arizona Supreme Court answered both questions affirmatively. No Petition for a Writ of Certiorari was taken as to Interlocutory Issue 5.

ARGUMENT:

THERE IS NO COMPELLING REASON TO GRANT CERTIORARI. CERTIORARI SHOULD BE DENIED.

"Review on a writ of certiorari is not a matter of right, but of judicial discretion," and a petition for certiorari will be granted only for compelling reasons. Rule 10, Rules of the Supreme Court of the United States. There are no compelling reasons for the Court to grant this Petition.

I. THERE IS NO REAL OR INTOLERABLE CONFLICT BETWEEN THE LOWER COURTS.

This Court has stated:

> Certiorari is granted . . . only in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and . . . where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

National Labor Relations Board v. Pittsburgh S.S. Co., 340 U.S. 498, 502, 71 S. Ct. 453, 456, 95 L. Ed. 479 (1951).

A. THERE IS NO CONFLICT BETWEEN THE FEDERAL COURTS AND THE ARIZONA SUPREME COURT.

The decision of the Arizona Court, as to Interlocutory Issue 4, is consistent with all federal court decisions that have made a determination as to the applicability of the *Winters* or federal reserved water rights doctrine to groundwater. The District Court for the District of Montana examined this issue, in 1968, in *Tweedy v. Texas Company,* 786 F. Supp. 383, 385, stating:

> The Winters case dealt only with the surface rights, but the same implications which led the Supreme Court to hold that surface waters had been reserved would apply to underground waters as well. The land was arid – water would make it more useful, and whether the waters were found on the surface of the land or under it should make no difference.

The Ninth Circuit Court of Appeals also examined this issue in *United States v. Cappaert,* 508 F.2d 313, 317 (1974):

> The Cappaerts contend, however, that the doctrine of implied reservation of water does not apply to groundwater, but only to surface water. Although these Supreme Court cases involved only surface water rights, the reservation of water doctrine is not so limited.
>
> Two cases in the Ninth Circuit approved the application of the doctrine of implied reservation of groundwater when water was needed to accomplish the purpose of the reservation. Nevada ex rel. Shamberger v. United States, 165 F. Supp. 600 (D. Nev. 1958), aff'd on other grounds, 279 F.2d 699 (9th Cir. 1960); Tweedy v.

> Texas Co., 286 F. Supp. 383 (D. Mont. 1968). In our view the United States may reserve not only surface water, but also underground water.

The United States Claims Court stated, in *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660, 699 (1986), that "[g]round water under the Gila River reservation impliedly was reserved for the Indians." The District Court for the District of Washington held that *Winters* or federally reserved water rights "extend to groundwater as well as surface water." *Colville Confederated Tribes v. Walton*, 460 F. Supp. 1320, 1326 (1978). *See also State of New Mexico v. Aamodt*, 618 F. Supp. 993 (D. N.M. 1985). In *Granite Reef Dam*, the Arizona District Court also held that the *Winters* or federal reserved water rights doctrine extended to groundwater. It then made an independent finding that determination of the rights of Indian and other federal reservations to percolating groundwater was required by the Arizona general water rights adjudication statutes.

Respondents found no federal case holding that the *Winters* doctrine does *not* extend to groundwater. Having cited no such case, it may be presumed that the Ninth Circuit Court of Appeals, the United States District Courts for the Districts of Montana, Washington, New Mexico and Arizona, the Arizona Supreme Court, and the Petitioners also found no such case.

Petitioners are incorrect in their claim that the Arizona Court has somehow created federal common law. The Arizona Supreme Court did not extend the *Winters* doctrine. Rather, the Arizona Court applied *Winters v. United States* in conformity with all of the existing federal court opinions that have examined the issue of reserved

rights to groundwater. The Arizona Court was correct in its determination as to Interlocutory Issue 4, under federal law as well as under the law of the State of Arizona.

B. THERE IS NO SIGNIFICANT CONFLICT BETWEEN STATE SUPREME COURTS.

The mere existence of a difference of opinion between two state supreme courts is not a sufficient reason for this Court to grant a petition for a writ of certiorari. There is no significant or compelling conflict between the opinions of the Arizona Supreme Court and the Wyoming Supreme Court. There is no "real and embarrassing conflict of opinion and authority" that requires this Court's time and review. As noted earlier, state laws governing surface and underground waters, and judicial recognition of the right to use those waters, vary widely from state to state. The State of Wyoming does not have the same water laws as the State of Arizona. The fact that two state supreme courts, examining an issue in light of their own state laws, might come to differing conclusions is hardly a basis for intervention by this Court. Other state courts can and will take both the Arizona Court's decision in *Gila River III*, and the Wyoming Court's decision in *In re the General Adjudication of All Rights to Use Water in the Big Horn System*, 753 P.2d 76 (1988), for what they are – interesting opinions that may or may not be persuasive in light of the individual state's water laws. It would not be a proper utilization of this Court's resources to serve as a "super nanny" for the purpose of regulating state court interpretation of state water law.

Proof of the ability of the individual states to make an independent analysis, as to the issue of federal reserved water rights and groundwater and its application within a particular state system, is found in the Arizona Court's determination of Interlocutory Issue 4. After carefully considered the Wyoming Court's decision in *Big Horn,* the Arizona Court wrote:

> [T]he Supreme Court of Wyoming recognized that "[t]he logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater." [Citations omitted.] Yet the court declined to find a reserved right to groundwater, stating in explanation only that it had been cited no previous decision which did so. [Citation omitted.]
>
> We can appreciate the hesitation of the Big Horn court to break new ground, but we do not find its reasoning persuasive. That no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so.

Gila River III, 989 P.2d at 745.

Petitioners are incorrect in their claim that the decision of the Supreme Court of Montana, in *Confederated Salish and Kootenai Tribes v. Clinch,* 56 Mont. 1356, 992 P.2d 244 (1999), demonstrates some "uncertainty" over the issue of reserved rights in groundwater. Quite the opposite, that opinion demonstrates that other state supreme courts are able to read and consider both the decision of the Supreme Court of Wyoming and the Supreme Court of Arizona and, then, to make their own independent decisions based on the unique facts and laws of their

states. It is also important to note that the Montana District Court had already ruled, thirty years earlier, that the reserved rights doctrine applied to underground as well as surface waters. *See Tweedy v. Texas Company*, 786 F. Supp. 383.

Justice Stevens, in *McCray v. New York*, 461 U.S. 961, 961, 103 S. Ct. 2438, 2438-2439, 77 L. Ed. 2d 1322 (1983), writing concerning the denial of certain petitions for writs of certiorari, advised:

> I believe that the further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. There is presently no conflict of decision within the federal system. During the past five years, two state supreme courts have [come to differing conclusions concerning prosecutors' use of pre-emptory challenges]. . . . [M]y judgment is it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by the Court.

Here, there appears to be no federal court decision that differs from the Arizona Supreme Court's determination on Interlocutory Issue 4. The only differing state supreme court decision indicated that it agreed with the logic that the Arizona Supreme Court used as the basis for its decision, but was unwilling to be the first to address the issue. Therefore, there is no real or significant conflict between the nation's courts that requires this Court's intervention.

II. THE ARIZONA SUPREME COURT DECISION, AS TO INTERLOCUTORY ISSUE 4, WILL NOT CREATE SERIOUS PROBLEMS IN ARIZONA.

A. THE ARIZONA SUPREME COURT DECISION IS UNIQUE TO ARIZONA AND PRESENTS NO ISSUE OF NATIONAL IMPORTANCE.

Petitioners are partially incorrect in their claim that "the decision below would create grave, unique problems throughout Arizona." Petition, page 15. The decision on Interlocutory Issue 4 will have minimal impact on the majority of the lands and residents of the State of Arizona. However, Respondent agrees with Petitioners on one point – the effect of the Arizona Supreme Court's decision on Interlocutory Issue 4 is *unique* to Arizona and, therefore, presents no issue of national importance. No other state has Arizona's unique blend of water laws – including prior appropriation, a bifurcated underground water system, and administrative regulation of some, but not all, percolating waters – and Arizona's specific statute dealing with general adjudications of water rights.

The Arizona Supreme Court recognized the uniqueness of Arizona's groundwater laws in its decision on Interlocutory Issue 4, writing that "[c]onforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface waters and undertaken unitary management of water supplies." *Gila River III*, 989 P.2d at 744. Arizona's bifurcated system, which divides water into appropriable water (surface water and underground water designated as subflow) and non-appropriable water (underground water designated as percolating water), was recognized by the Arizona Court to be "an

artifice . . . that rests on a hydrological misconception." *Gila River III*, 989 P.2d at 743.

The Arizona Supreme Court's determination, as to Interlocutory Issue 4, was based on a detailed analysis of Arizona's unique general adjudication statutes and the interrelationship of those statutes to Arizona's unique groundwater law. The Arizona Court wrote:

> The City of Phoenix argues that our general adjudication statute permits us to adjudicate federal water claims only to the extent that they are claims to water that is appropriable under state law, and, thus, that we lack jurisdiction to consider federal reserved rights claims to non-appropriable groundwater. We summarily reject this argument because it is contrary to the plain, conjunctive definitional language of A.R.S. § 45-251(4) and because such an interpretation would deprive this adjudication of the comprehensive quality that our general adjudication statute was intended to provide.

Gila River III, 989 P.2d at 744 n. 5.

The Arizona Supreme Court, in this and other rulings with regard to the Gila River Adjudication, has studied the history of Arizona's statutes governing general adjudications of water rights. Prior to 1979, Arizona had a statute for determination of conflicting water rights that was administrative, was limited to state prior appropriation rights, and did not consider federal rights. *See* A.R.S. §§ 45-231 through 45-245 (repealed 1979).

In 1979, a number of Indian tribes filed actions arguing, *inter alia*, that Arizona's system for determination of

conflicting water rights did not comply with the McCarran Amendment because it did not provide for the adjudication of Indian rights to percolating groundwater. *See Granite Reef Dam*, 484 F. Supp. 778. Two months after the Indians brought these actions, the Arizona Legislature abolished its existing water rights determination process and adopted a totally new process that defined a general adjudication as a judicial determination of the rights of all persons (including Indian tribes) to use water in any river system and source. *See* A.R.S. § 45-251(1) and (3). The Arizona Legislature defined *river system and source* as "all water appropriable under § 45-141 and all water subject to claims based upon federal law." A.R.S. § 45-251(7). Following the adoption of these statutes, the District Court either remanded the Indian cases back to state court or dismissed them, without prejudice, because "the State proceedings will determine federal reserved rights (including federal reserved rights to percolating groundwater)." *Granite Reef Dam*, 484 F. Supp. at 784.

The Arizona Supreme Court has correctly determined that the Arizona Legislature intended to include Indian water rights to percolating groundwater in its general water rights adjudication statutes.

> Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state.

Johnson v. Frankell, 520 U.S. 911, 916, 117 S. Ct. 1800, 1894, 138 L. Ed. 2d 108 (1997).

The Arizona Court having interpreted the Arizona statutes as including federal rights to percolating groundwater, such "state interpetation is as though written into the ordinance itself." *Poulos v. New Hampshire*, 345 U.S. 395, 402, 73 S. Ct. 760, 765, 97 L. Ed. 1105 (1953). *See also Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 838, 98 S. Ct. 1535, 1541, 56 L. Ed. 2d 1 (1978).

In *Reitman v. Mulkey*, 387 U.S. 369, 378-379, 87 S. Ct. 1627, 1633, 18 L. Ed. 2d 830 (1967), this Court reviewed a specific California statute and stated:

> Here the California court, armed as it was with the knowledge of the facts and circumstances concerning the passage and potential impact of s 26 and familiar with the milieu in which that provision would operate, has determined that the provision would involve the State in private racial discrimination to an unconstitutional degree. We accept this holding of the California Court.

Here, the Arizona Supreme Court, armed with knowledge of the facts and circumstances concerning Arizona's unique groundwater laws and unique general water rights adjudication statutes, recognized that Arizona's laws on percolating groundwater are hydrologically unsound. It further considered that the Arizona Legislature amended its statutes in response to certain federal court claims concerning percolating groundwater and that, based on the statutes' adoption, these federal court claims were remanded or dismissed.

The Arizona Supreme Court recognizes that "blind devotion to federal interpretation is not required; we

need not follow the federal cases if we believe Arizona policy, practice, or case law requires a different result." *Richie v. Grand Canyon Scenic Rides*, 165 Ariz. 460, 464, 799 P.2d 801, 805 (1990). Yet, based upon its intricate knowledge of Arizona's unique laws and unique hydrology, the Arizona Court determined that the Arizona statutes give Arizona courts the jurisdiction to adjudicate the rights of Indian and other federal reservations to percolating groundwater. Pursuant to its reasoning in *Reitman*, this Court should refuse to grant this Petition for a Writ of Certiorari.

Because of the complex factual and legal history surrounding the Arizona Court's determination as to Interlocutory Issue 4, this case does not present a good vehicle for this Court's review. First, neither the Petitioners nor any other landowners/water users have any "right of ownership of groundwater in Arizona prior to its capture and withdrawal from the common supply and the right of the owner of the overlying land is simply to the usufruct of the water." *Chino Valley II*, 131 Ariz. at 82, 638 P.2d at 1328. Thus, there is no need to consider any federal question because, under Arizona's local laws, Petitioners have no rights of ownership to the groundwater.

In addition, this case has been in litigation for over twenty years and the Arizona courts, state and federal, have decided this issue consistently over that twenty-year period. Based on the actions filed in *Granite Reef Dam*, the Arizona Legislature completely altered its process for water rights determinations. Based on the Arizona Legislature's actions, the District Court remanded the Indian claims back to state court because "the State proceedings will determine federal reserved rights

(including federal reserved rights to percolating groundwater)." *Granite Reef Dam*, 484 F. Supp. at 784. The Salt River Valley Water Users' Association, Phelps Dodge Corporation, and the State of Arizona, as well as the Gila River Indian Community and the San Carlos Apache Tribe, were all parties to that litigation. Whether the justification is res judicata, collateral estoppel, judicial estoppel, law of the case, or simply a realization that this has been the state of the law on this issue in this proceeding for twenty years, there is no reason for this Court to accept jurisdiction now. Salt River Project (Salt River Valley Water Users' Association and Salt River Project Agricultural Improvement and Power District) had the opportunity to appeal the District Court's determination in 1980 and chose not to exercise that option.

B. THE ARIZONA SUPREME COURT DECISION DOES NOT IMPACT ON THE VAST MAJORITY OF ARIZONA'S CITIZENS.

Petitioners are incorrect in their claim that the Arizona Court's determination, as to Interlocutory Issue 4, will create grave problems throughout Arizona. In actuality, Issue 4 will have a very narrow impact. The Arizona Court noted, "some reservations lack perennial streams and depend for present or future survival substantially or entirely upon pumping underground water." *Gila River III*, 989 P.2d at 746. The Arizona Court also wrote: "A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation." 989 P.2d at 748. Thus, the federal reservations that *might* have water rights, under Issue 4, are those reservations that do not have surface water

resources available to them and have not had surface resources in the past. The water basins subject to Interlocutory Issue 4 represent only 1% of Arizona's current population – less than 20,000 people – and only 2% of current water use. *See* Appendices A-3 and A-4.

The Arizona Court's decision, with regard to Interlocutory Issue 5, indicates that holders of federal reserved water rights enjoy greater protection from groundwater pumping than do holders of state law rights. As in this Court's decision in *Cappaert v. United States*, 426 U.S. 128, 143, 96 S. Ct. 2062, 2071, 48 L. Ed. 2d 523 (1976), Issue 5 deals with the ability of a federal reservation to "protect its water from subsequent diversion, whether the diversion is of surface or groundwater." Appendices A-2 through A-4 are based on the Arizona Department of Water Resources' *Arizona Water Resources Assessment* of August 1994, which divided the state into a number of water basins based upon similar hydrology. Interlocutory Issue 5 will affect those water basins that contain a federal reservation that has, or would have but for upstream development and depletion, surface water resources available. Issue 5 will also affect water basins without a federal reservation but that are hydrologically connected to basins with a federal reservation. Issue 5 does have the potential to impact on lands that encompass 87% of the current water use and 97% of the current population of Arizona. Interlocutory Issue 5, however, was not appealed.

In addition, the State of Arizona has created four groundwater active management areas that encompass the lands inhabited by the vast majority of Arizona's residents. At least 80% of the population of Arizona

resides in active management areas and over 67% of the water use of the state takes place in the active management areas. *Cherry v. Steiner,* 543 F. Supp. at 1280.

Use of percolating underground water is strictly limited in active management areas. Water users in the four active management areas had severe restrictions imposed upon their use of percolating underground water twenty years before the Arizona Supreme Court issued its opinion on Interlocutory Issue 4. The state parties, including SRP, have argued to the Arizona Supreme Court that the Arizona Groundwater Management Act, and its active management areas, may adequately protect federal reserved rights holders against groundwater depletion through its restrictions on the reasonable use doctrine and its requirement of conservation measures in parts of Arizona. The Arizona Supreme Court has decided that this is an open question, to be determined based upon the particular facts of a particular federal reservation. In light of the fact that the Arizona Groundwater Management Act may sufficiently protect the groundwater resources of the federal reservations, without resort to implementation of the Arizona Court's decision on Interlocutory Issue 4, it is proper for this Court to deny certiorari until there is a real, rather than hypothetical, question before it.

Much of Petitioners' Brief deals with insinuations that the Arizona Court's decision, as to Interlocutory Issue 4, might have a negative impact on some federal reservation – presenting vague, unsubstantiated hypotheticals, including the Hopi and Navajo Reservations. However, the Indian Tribes of Arizona, including the Hopi Tribe and the Navajo Nation, vigorously argued in

favor of the decision rendered by the Arizona Supreme Court – recognizing the legal and practical suitability of the Arizona Court's decision. The United States and the Indians understand the meaning, effect, and impact of the Arizona Court's decision as to Interlocutory Issue 4, and believe it is appropriate for federal reservations within Arizona.

Petitioners' claim, that this very limited decision would force Arizona to abandon existing state law governing groundwater and substitute a priority scheme, is in error. Arizona has a serious problem with depletion of its water supplies. As explained by the Arizona Supreme Court in *United States v. Superior Court of Arizona*, 144 Ariz. at 270, 697 P.2d at 662:

> We take note that the current state of our water supply is critical. Water usage in Arizona exceeds surface supply by three-fold in average years and by more in dry years, with the shortfall made up by pumping groundwater. We also take notice of the depletion of the available groundwater supply.

In 1931, Arizona adopted a groundwater system that divides underground water into subflow and percolating water. In *Gila River III*, 989 P.2d at 742, the Arizona Supreme Court recognized that percolating water was hydrologically connected to surface water. Despite the Arizona Supreme Court's recognition that Arizona's bifurcated system for underground water is not hydrologically sound, and is out of date with other states' application of modern and scientifically valid principles of hydrology, the Arizona Court has chosen to retain that bifurcated system.

The State of Arizona has taken some limited steps to deal with the scientific irrationality of its own laws. The first step was the Arizona Legislature's adoption of the Arizona Groundwater Management Act, which places restrictions on the use of percolating underground water in four critical management areas. The second step was the decision of the Arizona Supreme Court that it could not impose Arizona's hydrologically unsound groundwater system on federal reservations.

The Arizona Court did not abandon existing state law governing groundwater. Rather, it exercised its option to amend state law to deal with specific situations, while still retaining the general groundwater bifurcation. The Court's recognition that, under certain conditions, federal reservations might have a right to protect their groundwater resources from groundwater depletion does not abandon state law. The state rule on percolating groundwater remains in effect, modified by the Groundwater Management Act and by the Arizona Supreme Court's decision on Interlocutory Issue 4.

III. THE ARIZONA SUPREME COURT DECISION, AS TO INTERLOCUTORY ISSUE 4, COMPLIES WITH THE GUIDELINES OF *UNITED STATES v. KIMBELL FOODS.*

While Respondent does not believe that a *Kimbell Foods* analysis was necessary, the Arizona Supreme Court did apply the test of *United States v. Kimbell Foods,* 440 U.S. 715, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979), in analyzing the applicability of federal law to the rights of

federal reservations to groundwater. The Arizona Court first discussed the need for application of federal law:

> [I]n order to adjudicate water rights based upon federal law, the Arizona courts must afford federal claimants the benefit, when state and federal law conflict, of federal substantive law. See Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 571, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983).
>
> * * *
>
> [T]he Supreme Court has defined the reserved rights doctrine as an exception to Congress's deference to state water law. See United States v. New Mexico, 438 U.S. 696, 714, 98 S. Ct. 3012, 75 L. Ed. 2d 1052 (1978) . . . see also United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 703, 19 S.Ct. 770, 43 L.Ed. 1136 (1899) (state law cannot be applied to destroy the federal government's right to water on its lands).

Gila River III, 989 P.2d at 744-745 and 747.

The Arizona Court then considered whether the application of state law, with regard to percolating groundwater, would frustrate specific objectives of federal programs. It noted:

> Where federal rights are at issue, a state court may adopt state law as the rule of decision if to do so would not frustrate or impair a federal purpose. See United States v. Kimbell Foods, Inc., 440 U.S. 715, 728-29, 99 S. Ct. 1448, 59 L. Ed. 2d 711 (1979). *Such is not the case here.* [Emphasis added.]

Gila River III, 989 P.2d at 747.

After extensive analysis of how groundwater pumping could interfere with the present and future water rights of Indian and other federal reservations, the Arizona Court determined:

> We therefore cannot conclude that deference to Arizona's law – and to the opportunity it extends all landowners to pump as much groundwater as they can reasonably use – would adequately serve to protect federal rights.

Gila River III, 989 P.2d at 748.

Kimbell Foods discussed the need to consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law. 440 U.S. at 729, 99 S. Ct. at 1459. The Arizona Court considered this issue in detail:

> We recognize that our determination that reserved water rights may encompass groundwater threatens to disrupt the assumptions that underlie state law uses. State law parties may question how our present holding may be squared with our decision in Gila River II to retain Arizona's traditional bifurcation of the law of surface and groundwater. We are no less cognizant now than when we decided Gila River II that Arizona's agricultural, industrial, mining and urban interests have accommodated themselves to the framework of Southwest Cotton. [Citation omitted.] Yet there long has loomed the need – sometimes noted, sometimes wished away – for those same interests also to accommodate themselves to the water claims of the vast federal land holdings that surround them. [Citation omitted.] For state law purposes in

> Gila River II, we found reason to retain a bifurcated framework despite the hydrological misconceptions upon which it rested. But federal law does not permit us that option in deciding the extent of federal reserved rights. As Leshy and Belanger wrote in summary of Cappaert, "For federal law, the question is one of hydrology, not legal compartmentalization." 20 Ariz. St. L.J. at 734.
>
> We do not underestimate the burden that the State of Arizona will face in accommodating federal reserved water rights within its water resource management. Nor do we underestimate the burden that the trial court will face in adjudicating the extent and relative priority of such rights. Unless there is a comprehensive settlement, however, we must heed the lesson that "the best way out is always through." To solve the conflict and uncertainty that reserved rights engender, we must quantify them, for we may not ignore them.

Gila River III, 989 P.2d at 750.

The Arizona Court considered every element listed in *Kimbell Foods* and determined that the Arizona water rights adjudication statutes and Arizona water law made percolating groundwater available, when necessary, to fulfill federally reserved water rights.

IV. THE ISSUES BEFORE THE ARIZONA SUPREME COURT, CONCERNING INTERLOCUTORY ISSUE 4, ARE TOO PRELIMINARY TO WARRANT REVIEW BY THIS COURT.

While a state or federal court decision may be sufficiently final to meet the jurisdictional requirements for a writ of certiorari, the decision may be too uncertain or preliminary to warrant this Court's granting such petition. That is the situation in this case. It is important, of course, to point out that the Arizona Court's determination as to Issue 4 is interlocutory. It is more important to note the factors in the decision itself which evidence the Arizona Supreme Court's recognition that neither it, nor the trial court, is finished with this issue – and that further proceedings will be necessary to determine whether Interlocutory Issue 4 will ever have a real effect on any Indian or other federal reservation, or on any non-federal water user.

The Arizona Court wrote:

> For the foregoing reasons, we hold that the trial court correctly determined that the federal reserved water rights doctrine applies not only to surface water but to groundwater. We decide this issue in the abstract at this time as a necessary step in determining the scope of interests to be encompassed by this adjudication. We do not, however, decide that any particular federal reservation, Indian or otherwise, has a reserved right to groundwater. A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation. To determine the purpose of a reservation and to determine the waters

> necessary to accomplish that purpose are inevitably fact-intensive inquiries that must be made on a reservation-by-reservation basis.

Gila River III, 989 P.2d at 739.

In a footnote, the Arizona Court reiterated that "[u]ntil federal rights are quantified, it cannot be determined which if any of the tribes are entitled to such relief." 989 P.2d at 749 n. 12. The Arizona Court also noted that its decision on the definition of subflow (Interlocutory Issue 2, briefed and argued but not yet decided) could conceivably be broad enough to protect the rights of some or all of the federal reservations. 989 P.2d at 749. The decision, as to Interlocutory Issue 2, will also affect whether Interlocutory Issue 4 will ever have a real-world effect.

At this time, no one knows if this issue is simply an interesting academic question that will never have an actual application. This Court should refuse to grant the Petition for Writ of Certiorari until it has been determined that the Arizona Court's ruling actually affects some specific federal reservation and some actual non-federal water user.

The Arizona Supreme Court also recognized that questions regarding the effectiveness of the Arizona Groundwater Management Code must be answered before a determination can be made as to whether Interlocutory Issue 4 would have any impact in the case of a specific reservation. The Arizona Court wrote:

> We similarly approach [rejecting as premature] the state law parties' argument that federal reserved rights holders may be adequately protected against groundwater depletion by the

> 1980 Groundwater Management Code, which restricts application of the reasonable use doctrine and mandates conservation measures in some parts of Arizona. . . . Whether any particular reservation receives adequate protection of its reserved water rights through the combination of Arizona's common and statutory law remains to be determined.

Gila River III, 989 P.2d at 749 n. 13.

Until the specific facts concerning individual reservations have been analyzed in light of the provisions of the Arizona Groundwater Management Code, the Arizona Court's ruling on Interlocutory Issue 4 remains merely a matter of academic and speculative interest.

V. CONCLUSION

There are no compelling reasons that would justify granting the Petition for a Writ of Certiorari filed herein. Therefore, the Gila River Indian Community respectfully requests that the Court deny this Petition.

Respectfully submitted,

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EXPLANATORY DATA

The Arizona Department of Water Resources ("ADWR") divided the state into a number of water basins in its *Arizona Water Resources Assessment of August 1994*. The ADWR water basins are based on interrelated hydrology – surface and underground water – within distinct land areas. The size and shape of a water basin is determined by the geology of the region.

The Arizona Department of Water Resources *Assessment*, Volume I, *Inventory and Analysis*, August 1994, pages 13, 14, 139, 141, 153, 155, 173, 175, 192, and 194, provided the data for the water basin map, the water basin designation, the population data per water basin, and the water supply data per water basin. Population figures of less than 100 people were rounded up to 100. Water use figures of less than 1000 acre-feet were rounded up to 1000 acre-feet.

A determination was made as to whether a particular ADWR water basin contained federal reserved lands (federal lands that have been designated as a federal reservation, such as an Indian Reservations, Military Reservations, National Parks, National Monuments, etc.). Bureau of Land Management lands that have not been designated as federal reservations, with potential *Winters*/reserved water rights, were not considered.

The ADWR water basins that are shaded purple contain federal reservations that have surface water resources available to them, or would have had surface water resources available but for upstream and/or neighboring development and depletion. If an ADWR water basin has or had surface water resources, and is upstream

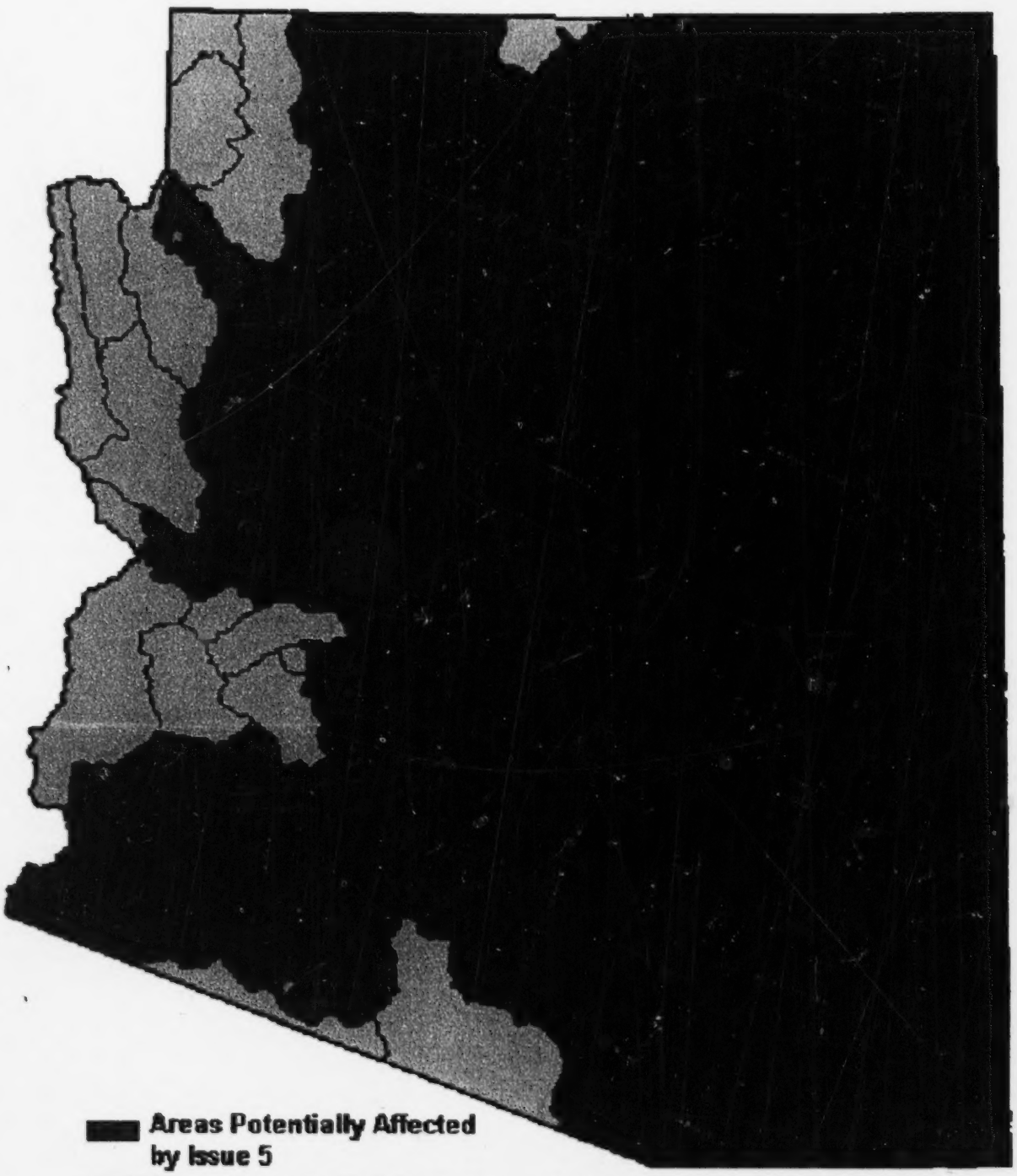
from a federal reservation that has or had surface water resources available to it, then this water basin is also shaded purple. An exception was made for any ADWR water basin that was 100% federal land, and was not upstream from another basin. [This water basin designation does not attempt to determine whether any of the federal reservations have any actual water rights. It only designates that the water basin does or did contribute to surface water that was or is available for use by the federal reservations, if such a water use right should be determined to exist.] ADWR water basins that contain federal reservations with actual or potential surface water resources provided from the Colorado River were not designated as purple because their water rights are governed by *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468, 10 L. Ed. 2d 542 (1963). The ADWR water basins that are shaded purple are subject to the Arizona Supreme Court determination on Interlocutory Issue 5; *i.e.*, that federal reserved rights holders are entitled to greater protection from groundwater pumping than are water users who hold only state law rights.

The ADWR water basins that are shaded green contain federal reservations that do not have surface water resources available to them, and did not have such resources available in the past. For these federal reservations, underground water is the only water resource available. If an ADWR water basin consisted totally of a federal reservation, it was not shaded green. The ADWR water basins that are shaded green are subject only to the Arizona Supreme Court determination on Interlocutory Issue 4; *i.e.*, that federal reserved water rights extend to groundwater (underground water) that is not subject to

prior appropriation under Arizona law. The water basins that are shaded green have no water resources available that would be subject to the Arizona Supreme Court's determination on Interlocutory Issue 5.

The ADWR water basins that are shaded yellow do not have a federal reservation and are not upstream of a federal reservation or, if they do have a federal reservation, that federal reservation's water use rights are governed by *Arizona v. California,* or are totally federally-owned.

Potential Impact of Issues 4 and 5 On Arizona's Hydrologic Regions



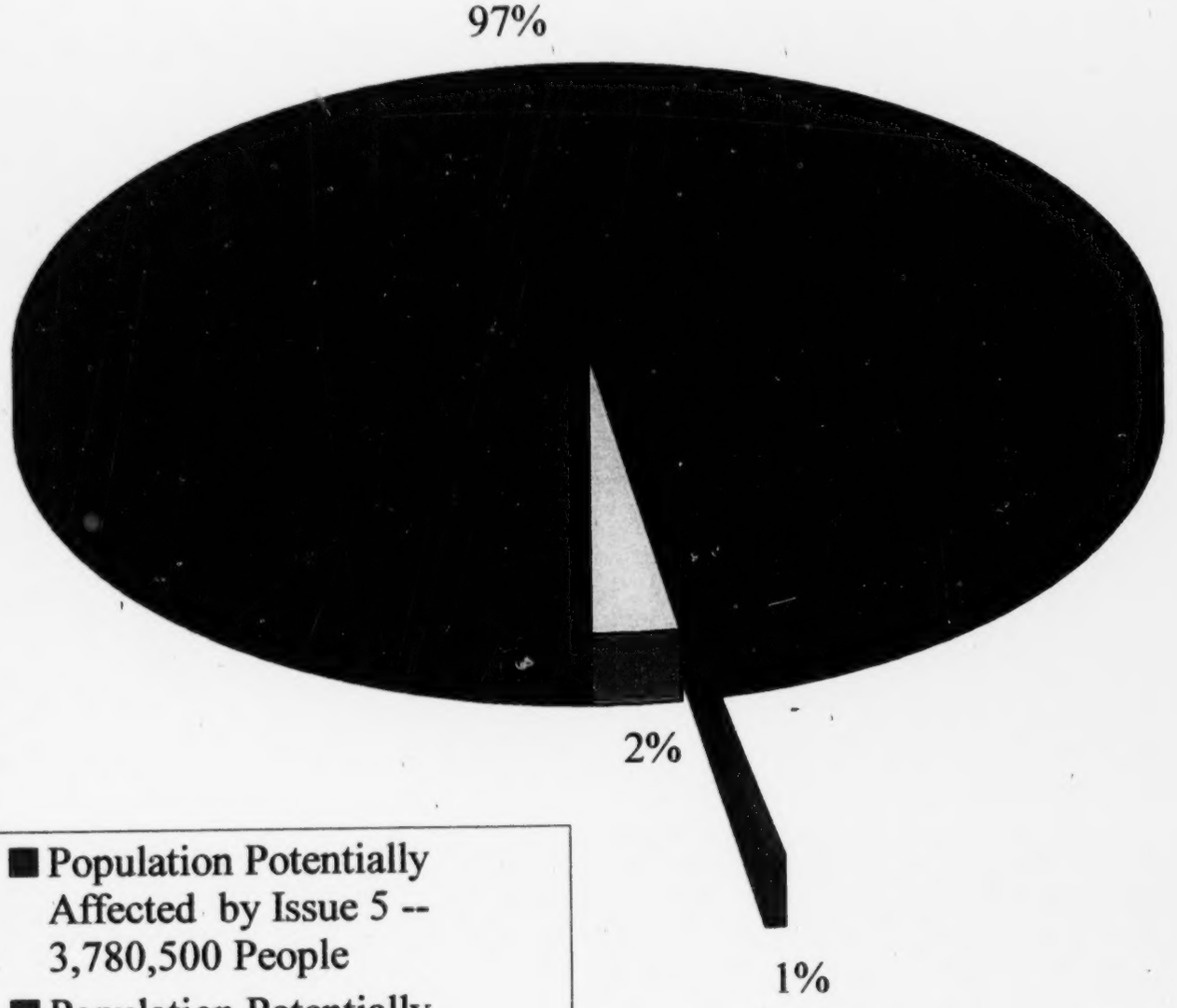
Areas Potentially Affected by Issue 5

Areas Potentially Affected by only Issue 4

Areas Unaffected by Issues 4 or 5

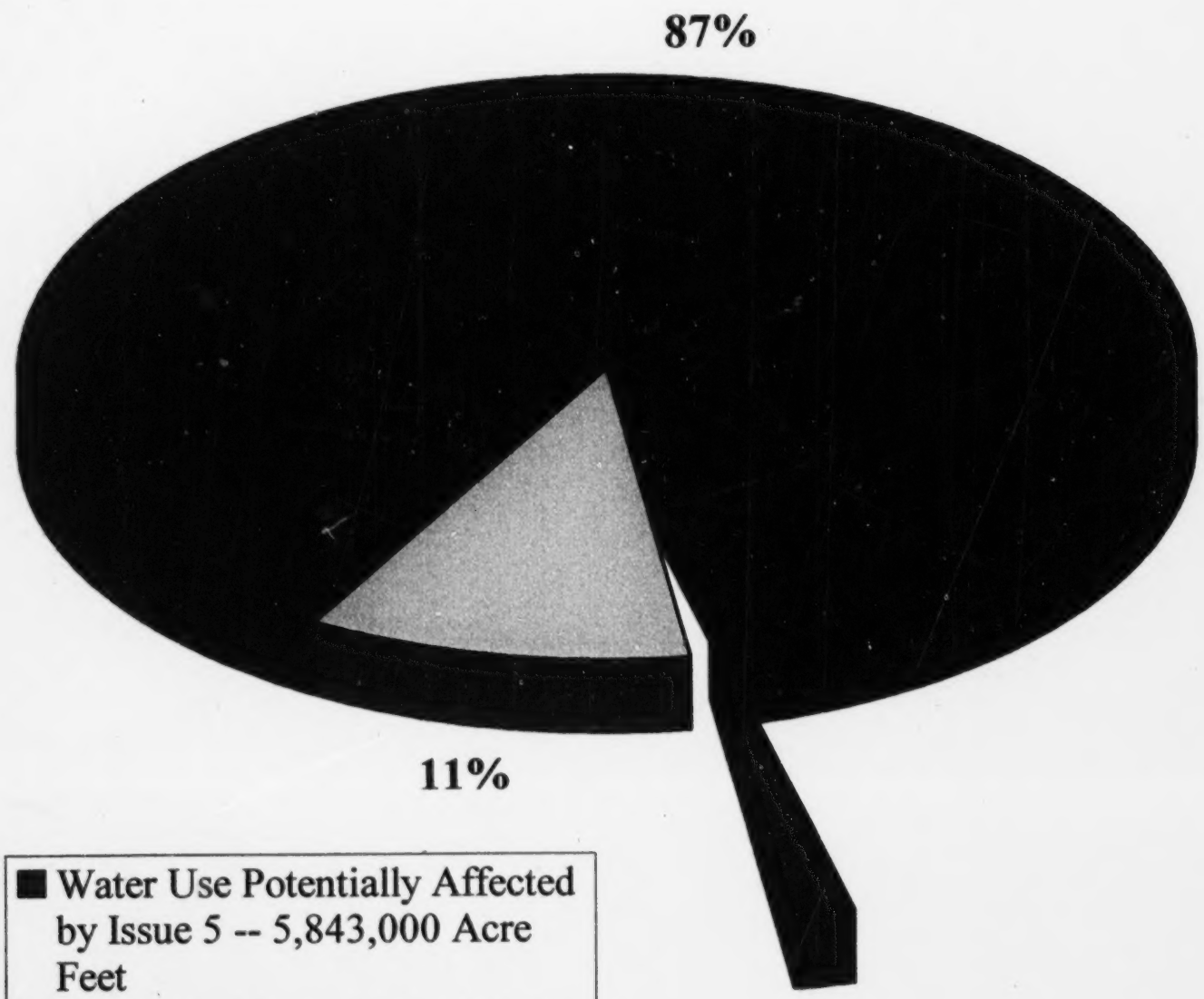
Map Base from ADWR Arizona Water Resources Assessment August 1994
Modifications and Determination of Regions by GRIC Office of Water Rights

Potential Impact of Issues 4 and 5 on Arizona's People



Data Compiled by the GRIC Office of Water Rights from the *Arizona Water Resources Assessment* By Arizona Department of Water Resources August,1994

Potential Impact of Issues 4 and 5 on Arizona's Water Use



Data Compiled by the GRIC Office of Water Rights from the *Arizona Water Resources Assessment* By Arizona Department of Water Resources August,1994

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No. 99-1389

Supreme Court, U.S.
FILED
JUN 2 2000
OFFICE OF

In The

Supreme Court of the United States

SALT RIVER VALLEY WATER USERS' ASSOCIATION and SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,

Petitioners,

versus

THE UNITED STATES, THE SAN CARLOS APACHE TRIBE, THE TONTO APACHE TRIBE, THE YAVAPAI-APACHE NATION, THE HOPI TRIBE, THE NAVAJO NATION, THE SAN JUAN SOUTHERN PAIUTE TRIBE, THE GILA RIVER INDIAN COMMUNITY, and SILAS KISTO,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arizona

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

I. THE DECISION OF THE ARIZONA SUPREME COURT IS SUBJECT TO REVIEW AT THIS TIME UNDER 28 U.S.C. § 1257(a)

A. Finality Is Determined Under a Pragmatic, Not Mechanical, Approach

This Court has rejected the notion that the finality requirement in 28 U.S.C. § 1257(a) should be administered in a "mechanical fashion" by precluding review where anything further remains to be determined by a state court. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). Instead, modern conceptions of finality follow a "pragmatic approach," *id.* at 487, that responds to "special needs." 16B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure: Jurisdiction 2d* § 4008 (2d ed. 1996). There "are now at least four categories" of cases in which a state court decision on a federal issue is final under 28 U.S.C. § 1257 despite anticipation of additional proceedings in courts below. *Cox Broadcasting*, 420 U.S. at 477.

B. The Decision At Issue Is Final Under the Second Category Identified in *Cox Broadcasting*

The decision by the Arizona Supreme Court that is the subject of the pending petition for a writ of certiorari falls within the second category identified in *Cox Broadcasting*. That category consists of cases in which "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting*, 420 U.S. at 480.

Respondents do not dispute that the question presented by the petition – whether federal reserved rights extend to nonappropriable groundwater – was finally

decided by the highest court in the State of Arizona in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739 (Ariz. 1999) (sometimes referred to in this reply as "*Gila River III*"). This Court's jurisdiction, therefore, depends upon survivability. We submit that because of the nature and importance of the question presented, it is virtually certain that the issue would survive additional proceedings in state court. Like other cases in the second *Cox Broadcasting* category, this is not a case in which the decision at issue may become moot or be superseded as a result of additional proceedings in lower courts. *See* 420 U.S. at 479.[1]

The Arizona Supreme Court's decision on Issue 4, if not reversed at this time, would require the Superior Court to make three principal determinations relating to claims to federal reserved rights to groundwater: (1) the purpose of each Indian reservation and other federal enclave located within the numerous watersheds covered by the pending general stream adjudications, (2) the amount of water necessary to accomplish that purpose, and (3) the extent, if any, to which waters other than groundwater are inadequate to fulfill the purpose of the particular reservation. App. A24, A30.[2] These determinations would be governed by federal law.

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[1] Similarly, as the Supreme Court of Arizona recognized, the question presented is a discrete legal issue that is ripe for decision. The issue would not be further illuminated by postponing review by this Court until after Arizona courts apply the principles adopted in *Gila River III*.

[2] In the decision below, the Arizona Supreme Court held that a reserved right to groundwater "may only be found where other waters are inadequate to accomplish the purpose of a reservation." App. A24. This limitation necessitates properly categorizing and quantifying each source of water available to a particular federal reservation. Contrary to assertions in the

There is no merit to the suggestion by some of the respondents that the question presented by the pending petition may disappear during future proceedings in state court. In the first place, the ruling of the Arizona Supreme Court on Issue 4 would be the linchpin for any determination on remand that a particular reservation has a federal reserved right to groundwater. The allegedly erroneous result in *Gila River III* would survive as the threshold legal issue in any future petition to this Court challenging an award of a reserved right to groundwater.

Second, as to all federal reserved rights claims that are defeated as a result of determinations on remand relating to the particular reservation's purpose, water sources, and dependence upon groundwater, the ruling in *Gila River III* would survive for future consideration by this Court. As recognized by the Apache Tribe respondents, claims to federal reserved rights to groundwater are based upon federal law and therefore any successful challenge to a particular reservation's claim to such a right could not be limited to state law grounds. Apache Opposition at 15. Unsuccessful claimants of federal reserved rights would petition this Court to review the federal issues that were resolved against them in the course of state court refusal to award a federal reserved right. In response, the prevailing parties on that particular claim would cross-petition on the threshold issue of

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Hopi Tribe's Brief in Opposition at 3-4, springs and "spring-fed ephemeral stretches of otherwise dry washes" are appropriable under Arizona law. *See* A.R.S. § 45-141; *England v. Ally Ong Hing*, 459 P.2d 498 (Ariz. 1969). Therefore, such sources will not be impacted by reversal of the Arizona Supreme Court's decision that the federal reserved rights doctrine applies to nonappropriable water.

whether the federal reserved rights doctrine extends to nonappropriable groundwater.

Predicting that this Court would be asked to review awards or rejections of reserved rights claims to Arizona groundwater is not speculative. The stakes are enormous, giving parties ample incentive to petition this Court to resolve claims based upon *Winters v. United States*, 207 U.S. 564 (1908). Our petition explained that the people of Arizona are dependent upon groundwater, which is the primary water supply in most areas of the state. SRP Petition at 16. Many users of groundwater have no practical, affordable alternative. *Id.*

Several other factors contribute to the importance of the ultimate resolution of the applicability of *Winters* to groundwater. Arizona's population is expected to continue to grow at one of the fastest rates in the nation. The rivers which are the subject of the pending adjudications in Arizona are already fully appropriated and are insufficient to satisfy all Indian claims, much less other existing uses. *See* SRP Petition at 7 n. 5; Response of State of Arizona at 2 n. 2. Awards of federal reserved rights to surface water will necessitate a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *United States v. New Mexico*, 438 U.S. 696, 705 (1978). As Indian reservations divert more surface water awarded to them, parties who suffer a corresponding reduction in availability of surface water will necessarily turn to increased pumping of groundwater.

The supply of groundwater in Arizona is also limited, however. Generally, groundwater withdrawals already exceed natural recharge to Arizona aquifers. SRP Petition at 16. Awarding *Winters* rights to Arizona groundwater would pose a direct and substantial threat to other landowners by sharply curtailing the quantity of

water available to meet their needs.[3] Similarly, the United States and Indian tribes, which are fervently contending that federal reserved rights to groundwater are essential to the long-term fulfillment of the purpose of Indian reservations and other federal enclaves, presumably would ask this Court to overturn any state court rejection or significant limitation of their *Winters* claims.[4]

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[3] As explained in SRP's petition, nearly three-fourths of Arizona is comprised of Indian reservations and other federal lands that are interspersed with state and private lands in an interlocking pattern overlying common aquifers. *See* SRP Petition at 17. Reserving specified quantities of groundwater for reservations would diminish the supply available to other lands sharing the same aquifer.

In its zeal to avoid review by this Court, respondent Gila River Indian Community ("GRIC") asserts that the decision below is limited to federal reservations that have no surface water rights and therefore will affect fewer than 20,000 people. Brief in Opposition at 20-21. GRIC's effort to belittle the impact of *Gila River III* is refuted by its own conduct. Although GRIC has historically received surface water flows and has filed a claim for more than 1,500,000 acre-feet of water, it is demanding, pursuant to the decision below on Issue 4, that the trial court immediately enjoin these petitioners and all other non-Indians from pumping that interferes with the water supply for the reservation, which borders the Phoenix area. *See* SRP Petition at 21 n. 17. Such an injunction would affect literally millions of people and businesses near the reservation.

[4] In the Big Horn adjudication, *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988) ("*Big Horn I*"), *aff'd on other grounds by an equally divided Court sub nom. Wyoming v. United States*, 492 U.S. 406 (1989), Indian tribes asked this Court to review the holding of the Supreme Court of Wyoming that the *Winters* doctrine does not extend to groundwater. *See* SRP Petition at 11 n. 9. The issue obviously was important to the Wyoming tribes even though, according to some of the respondents in the present case, the purposes of the Wind River Reservation "could be wholly

A determination that the decision in *Gila River III* is not final for purposes of 28 U.S.C. § 1257 would delay, most likely for many years, a definitive resolution of a critical issue of federal law that will directly control the future course of the Arizona adjudications, which have already been pending for more than twenty years. The additional state court proceedings required by *Gila River III* to determine reservation purposes, available water, and dependence upon groundwater will entail fact-intensive, time-consuming, very expensive inquiries on a reservation-by-reservation basis that undoubtedly will involve tens of thousands of historical documents and extensive work by experts. In short, the parties and the court system would be subjected to "long and complex litigation" relating to groundwater which would "all be for naught" (quoting *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558 (1963)) if the question presented has been decided incorrectly by the Arizona Supreme Court.

Although immediate reversal of *Gila River III* would not dispose of all federal questions in the adjudications, it would eliminate the entire group of issues that pertain to alleged *Winters* rights to groundwater. Moreover, while *Cox Broadcasting* noted that "in most, if not all, of the cases" in the second category the additional state court proceedings "would not require the decision of other federal questions that might also require review by the Court at a later date," 420 U.S. at 479, the Court stopped short of holding that finality is lacking unless all federal

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satisfied by available surface water" and therefore the state court's refusal to find a federal reserved right to groundwater supposedly was *dicta*. Brief of Hopi Tribe, et al., at 27. A refusal to apply *Winters* to a reservation in Arizona that is dependent in whole or in part upon groundwater would not be *dicta* and undoubtedly would be viewed by federal claimants as justifying petitioning this Court for a writ of certiorari.

issues have been decided by the state court. More recently, the Court accepted jurisdiction in *Wyoming v. United States* (the Big Horn adjudication) before the state court had addressed all federal issues presented by the case.[5]

As stated by leading commentators, "it is clear that appealability should no longer depend on formal completion of the entire judicial unit identified by a state as a single 'case'. . . . " Wright et al., *supra*, § 4009 at 168. Modern finality doctrine is marked by concepts of separability, identifying policies served by prompt review, and avoiding hardship. *See id.* at 165, § 4010 at 169. Deferring review by this Court of federal issues involved in the pending Arizona adjudications until all state court proceedings on such issues have been concluded would leave the parties in limbo for decades. *See In re the Rights to the Use of the Gila River*, 830 P.2d 442, 445 n. 2 (Ariz. 1992) (*"Gila River II"*). The absence of definitive resolution of important federal questions would subject the parties and the state court system to a grave risk that the final decree entered by Arizona courts will be infected with reversible error despite spending roughly forty years and millions of dollars in litigation. Such waste and delay are not mandated by this Court's pragmatic approach to determining finality of state court rulings on federal issues.

Finally, it should be noted that the pending petitions are likely to be only the first of a number of petitions that will be filed before a final comprehensive decree is

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[5] The Big Horn adjudication is being conducted in phases. *In re the General Adjudication of All Rights to Use Water in Big Horn River System*, 899 P.2d 848, 850 (Wyo. 1995) (*"Big Horn II"*). As of 1989 when this Court affirmed *Big Horn I*, not all federal issues had been resolved by the Wyoming Supreme Court. *See Big Horn II*.

entered in the pending adjudications in Arizona. Like the Big Horn case, the Arizona adjudications are being conducted in stages. Each of the federal enclaves, including more than twelve Indian reservations, involved in the Arizona adjudications is being treated as a separate contested case. The only federal reservation for which the Superior Court has established a schedule for adjudicating claims is the GRIC Reservation. Claims based upon state law are being litigated on a watershed-by-watershed basis. The Gila River adjudication alone has been divided into eight separate watersheds. It is anticipated that as proceedings in a watershed are completed, the Superior Court will enter a separate judgment containing the finality language authorized by Rule 54(b) of the Arizona Rules of Civil Procedure.[6] As such orders and decrees adjudicating individual watersheds are entered, the prudent course for parties desiring review by this Court will be to promptly petition for certiorari, thus avoiding any waiver.

C. Immediate Review Falls Within the Penumbral Area that Is Not Limited to the *Cox Broadcasting* Categories

Finality is not limited to cases falling within one of the categories enumerated in *Cox Broadcasting*. 22 James Wm. Moore et al., *Moore's Federal Practice* § 406.03[3][e][i] (3d ed. 2000). *Cox Broadcasting* noted that there are "at least four categories" of cases finding finality despite the

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[6] The segmented approach of the Arizona and Big Horn adjudications stands in stark contrast to the unitary proceeding in *Arizona v. California*, 373 U.S. 546 (1963), in which all of the water rights of federal reservations, including Indian tribes, were adjudicated at one time and set forth in a single decree.

fact that further proceedings in state court are anticipated. 420 U.S. at 477. The concept of finality has acquired a "penumbral area" that is not limited to formerly strict interpretations of this Court's jurisdiction under 28 U.S.C. § 1257. *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945).

A water rights adjudication "is a virtually unique type of proceeding" which in certain contexts justifies departure from "general propositions." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 571 (1983).[7] A leading commentator suggests that multiparty and multiclaim cases "are better approached independently, outside the categories" described in *Cox Broadcasting*. Wright et al., *supra*, § 4010 at 197. Denial of immediate review by this Court may thwart state interests. *Id.* at 198. Comity concerns associated with immediate review by this Court are reduced by the fact that such review is consistent with the state system's resolution of the federal issue on an interlocutory basis. *Id.*

> If the state courts think it important to achieve an authoritative resolution of a controlling federal question for purposes of continuing proceedings that may prove lengthy and complex, the [Supreme] Court [of the United States] may properly cooperate by finding finality. Enabling state courts to proceed with confidence as to at least one federal issue is important enough to run some risks that future proceedings will bring the case back to the Court with different federal questions.

Id. at 199.

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[7] In *Nevada v. United States*, 463 U.S. 110 (1983), for instance, this Court recognized the need to create an exception, in water rights adjudications, to application of traditional principles of res judicata mutuality requirements. *Id.* at 143-144.

In providing a mechanism to review "the important legal decisions of the trial court as promptly as practicable at the outset of the adjudication," the Arizona Supreme Court explained that in a case of this magnitude "it is imperative that any significant error be corrected immediately to avoid conducting forty years of litigation only to discover the need to begin anew." *Gila River II*, 830 P.2d at 445 n. 2. Modern finality principles "respond to genuine needs." Wright et al., *supra*, § 4010 at 201.

II. CONCLUSION

This Court has jurisdiction to immediately review the Arizona Supreme Court's decision on Issue 4. For the reasons stated in our petition, we respectfully ask the Court to reverse the decision below.

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